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Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, ETC., ET AL.,
PETITIONERS,

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARD
COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1963

CERTIORARI GRANTED JANUARY 6, 1964

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

United States District Court

for the Eastern District of Virginia at Richmond

Civil No. 1333

EVA ALLEN, *et al.*,

Plaintiffs,

—v.—

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, *et al.*,

Defendants.

Docket Entries

Date 1960	Proceedings

Apr. 22—Order on Mandate (of May 5, 1959), ent'd & filed, retaining action on docket for further proceedings & etc. (Bryan, J.).

Apr. 27—Motion to withdraw appearance as counsel for County School Board of Prince Edward Co., filed by Hunton, Wms., Gay, Powell & Gibson, & Archibald G. Robertson, Jno W. Riely & T. Justin Moore, Jr. (members of the firm) and W. C. Fitzpatrick.

May 17—Order permitting Archibald G. Robertson, Jno W. Riely & T. Justin Moore, Jr. (members of the firm of Hunton, Wms., Gay, Powell & Gibson) & W. C. Fitzpatrick to withdraw as counsel for County School Board of Prince Edward Co., Va., ent. & filed May 17, 1960. Notice mailed counsel.

Docket Entries

Date 1960	Proceedings
June 13	Motion for leave to file supplemental complaint and to add additional defendants received & filed 6/10/60.
June 13	Supplemental Complaint received 6/10/60.
June 13	Motion to intervene received 6/10/60.
June 13	Complaint in intervention received, 6/10/60.
June 17	Notice of Motion & Motion to dismiss motion for leave to file . Supplemental Complaint filed.
June 21	Motion for continuance of Hearing on motion for Intervention & on motion to add additional Defts. & for leave to file supplemental complaint filed by deft. Geo. W. Palmer, member of School Bd. of Prince Edw. Co.
June 27	In chambers—before Orwin R. Lewis, Judge; appearance by counsel. Pending motions, after argument, continued to July 29, 1960 at 10 o'clock.
July 8	Motion of Harold P. White, Jr., etc., et al. to intervene and notice of motion, filed.
July 8	Notice of motion for hearing on motion to intervene and to file supplemental complaint, filed.
July 29	In Open Court—Lewis, J.: appearances by counsel. Plaintiffs moved to dismiss Geo. W. Palmer as party in so far as it dismisses Palmer as an individual only. Motion for leave to file supplemental complaint and add additional defendants argued by plaintiffs Collins Denny, Jr. moved for continuance. Motion denied. Argument concluded. Court takes time to consider.

Docket Entries

Date	Proceedings
1960	
Sept. 16	Order entered 9-16-60, as follows: leave is granted to plaintiffs to file their supplemental complaint; making State Board of Education, Supt. of Public Instruction and Bd. of Supervisors of Prince Edward County, parties deft. to this suit, each of them to be served with copies of the original and supplemental complaints; granting defts. 20 days from 9-16-60 to file such answers and/or other pleadings to the supplemental complaint as they deem advised; reserving ruling on motion to dismiss supplemental complaint as to T. J. McIllwaine, without prejudice to his right to renew the motion at a later date; granting motion of George W. Palmer that he be dismissed as a party deft. in his individual capacity, but he shall remain a party deft. as a member of the School Board of Prince Edward County; granting motions of Harold P. White, Jr., and others, and Cocheyse J. Griffin, and others, that they be permitted to intervene as parties plaintiff and the persons named therein are herewith made parties plaintiff, and filed.
Sept. 16	Supplemental complaint filed.
Sept. 21	Summons issued to State Bd. of Education, Supt. of Public Instruction & Bd. of Supervisors of Prince Edward Co., returnable 10-6-60.
Oct. 5	Motion for leave to withdraw as counsel for deft., T. J. McIllwaine filed by Hunton, Wms., Gay, Powell & Gibson, Archibald G. Robertson, Jno W. Riely, Jr. & T. Justin Moore, Jr.
Oct. 5	Order permitting withdrawal of above counsel as counsel for deft. T. J. McIllwaine, ent. & filed. Notice mailed counsel.

Docket Entries

Date	Proceedings
1960	
Oct. 5	—Order extending time to 10-24-60 for deft. County School Bd. of Prince Edw. Co., Va., T. J. McIllwaine, Div. Supt. of Schools of Prince Edw. Co., Supt. of Public Instruction, State Board of Education & Bd. of Supervisors of Prince Edward Co., to file answers, ent. & filed. Notice mailed counsel.
Oct. 7	—Marshal's return on summons executed and filed as to all defendants.
Oct. 24	—Motion of Board of Supervisors of Pr. Edw. Co. to dismiss supplemental complaint as to said Board of Supervisors, filed.
Oct. 24	—Motion of Supt. of Public Instruction and State Board of Education to dismiss Supplemental Complaint, filed.
Oct. 24	—Motion of School Board of Prince Edward Co. to dismiss the supplemental complaint permitted to be filed by Order of Sept. 16, 1960, etc. filed.
Oct. 24	—Motion of T. J. McIllwaine to dismiss supplemental complaint permitted to be filed by order of Sept. 16, 1960 filed.
1961	
Jan. 13	—Motion of plf. for leave to file amended supplemental complaint and to substitute successor defts. & add party deft., filed.
Jan. 24	—Letter of Court to counsel fixing Feb. 15, 1961 at 2:00 p. m. to fix dates for hearing on motions, filed.

Docket Entries

Date	Proceedings
1961	
Feb. 15	In Open Court—Lewis, J.: appearances by counsel. April 11, 1961 at 2:00 p. m. set for argument on motion to file amended supplemental complaint. May 8, 1961 set for hearing on all other motions that are filed or may be filed and on any motions that may be filed if filing of amended supplemental complaint is allowed.
Apr. 11	In Open Court—Lewis, J.: Motion to file amended supplemental complaint argued and granted.
Apr. 24	Order substituting parties deft. & filing amended supplemental complaint, making J. W. Wilson, Jr., Treas. of Prince Edw. Co., Va. party deft. All defts. to file responsive pleadings on or before 5-1-61, ent. & filed. Copy of order & amended complaint del. to Marshal for service on J. W. Wilson, Jr. Notice 77d issued.
Apr. 24	Amended supplemental complaint filed.
Apr. 26	Motion to Intervene as a plf. and to add defendants Prince Edward School Foundation, Commonwealth of Va. & Sydney C. Day, Comptroller of Virginia, filed by United States.
Apr. 26	Memorandum of Points & Authorities in support of motion of U. S. to intervene & to add parties deft. filed by U. S.
Apr. 27	Notice of motion on 5-8-61 for U. S. to intervene as plf. etc., filed.
Apr. 28	Marshal's return of service executed on order & supplemental complaint as to J. W. Wilson, Jr., filed.
May 1	Motion to dismiss filed by State Board of Education.

Date 1961	Proceedings
May 1	—Motion of T. J. McIlwaine to dismiss amended supplemental complaint permitted to be filed by order of 4-24-61, etc. filed.
May 1	—Motion of School Board of Prince Edward Co. to dismiss amended supplemental complaint permitted to be filed by order of 4-24-61, etc. filed.
May 1	—Motion of J. W. Wilson, Sr., Treas. of Prince Edward Co. to dismiss amended supplemental complaint filed.
May 1	—Motion of Board of Supervisors of Prince Edward Co. to dismiss amended supplemental complaint filed.
May 1	—Marshal's return on writ as to Atty. General executed & filed.
May 1	—Marshal's return on writ as to J. Barrye Wall, Jr. executed & filed.
May 1	—Marshal's return on writ as to Sidney C. Day, Jr. executed & filed.
May 3	—Motion to intervene as a deft. filed by John Bradley Minnick & to file answer to complaint of U. S. to intervene, filed.
May 3	—Memorandum of Points & Authorities in support of motion to intervene filed by John Bradley Minnick.
May 8	—In Open Court—Lewis, J.: Appearances by counsel. Motions to dismiss amended and supplemental complaint of plaintiffs argued. Attorney General of Virginia moved for continuance of Gov't. motion to intervene. Motions denied. Gov't. motion partly argued by Gov't. counsel.

Docket Entries

Date 1961	Proceedings
May 9	In Open Court—Lewis, J.: Appearances by counsel. Arguments concluded. Briefs to be filed.
May 24	Memorandum of Law filed by U. S.
May 24	Plaintiffs' Brief in opposition to motions to dismiss filed.
May 24	Memorandum in opposition to motion to intervene as a plf. and to add defts., filed by Atty. Gen.
May 24	Memorandum in support of motion to dismiss on behalf of the Supt. of Public Instruction and the State Bd. of Education, filed.
June 2	Memorandum as to Intervention of Right under Rule 24(a)(2) filed by Atty. Gen. of Va.
June 5	Letter of Court to counsel allowing Oliver W. Hill to withdraw as counsel, filed.
June 15	Memorandum opinion by the Court denying motion of United States to intervene as a party plaintiff and to add as parties defendant, Prince Edward School Foundation, Commonwealth of Virginia and Sydney C. Day, Jr., Comptroller of Virginia, entered June 14, 1961.
June 15	Opinion by the court denying without prejudice, motions to dismiss amended supplemental complaint, etc., granting defendants 20 days to answer or plead, fixing date for hearing on merits and fixing tentative date for formal pre-trial, etc., entered June 14, 1961.
June 15	Motion of County School Board of Prince Edward County to file report, with notice attached and report attached, filed June 15, 1961.
July 5	Answer of State Board of Education to amended supplemental complaint filed.

Docket Entries

Date 1961	Proceedings
July 5	**Answer of School Board of Prince Edward Co. to amended supplemental complaint filed.**
July 5	**Answer of T. J. McIlwaine to amended supplemental complaint filed.**
July 5	**Answer of J. W. Wilson, Jr., Treas. of Prince Edward Co., Va. to amended supplemental complant filed.**
July 5	**Answer of the Board of Supervisors of Prince Edward Co. to amended supplemental complaint filed.**
July 7	**Order denying motions to dismiss supplemental complaint, without prejudice to rights of defts. to renew their motions upon conclusion of hearing if they are then so advised; defts. to file answer or other pleadings to amended supplemental complaint within 20 days from 6-14-61; pre-trial proceedings as provided and scheduled in court's memorandum be observed; cause to be heard on merits 7-24-61; noting retirement from this cause as counsel for plfs.: Oliver W. Hill, Spottswood W. Robinson, III and Frank D. Reeves; ent. and filed.**
July 7	**Order denying motion of U. S. to intervene as party plf. & to add as parties deft. Prince Edward School Foundation, Com. of Va. & Sidney C. Day, Jr., Comptroller of Va. ent. 7-5-61, filed.**
July 24	Trial Proceedings—Before Hon. Oren R. Lewis, **Judge: Appearances by parties. Issues joined on all matters at issue. (Counsel appearing: S. W. Tucker & Robt. W. Carter, p.q.; J. Segar Gravatt, Frank N. Watkins, Frederick T. Gray, Attorney General of Virginia with R. D. McIlwaine, Collins Denny, Jr. with John F. Kay, Jr.; William C. King, p.d.).**

Date 1961	Proceedings
	Mr. Denny moved for leave to file report. S. W. Tucker opposed motion. Motion granted and report ordered received and filed. Report of School Board of Prince Edward County, Virginia, filed.
	In re: Motion of J. B. Minnick of May 3, 1961 to intervene: Opinion from Bench that motion should be denied and motion denied. Plaintiffs adduced evidence. Adjournment.
July 25—	Trial Proceedings—resumed: Parties again appeared. Bill for certified copies amounting to $159.00 filed by defendant, School Board. Plaintiffs adduced further evidence and rested. Adjournment.
July 26—	Trial Proceedings—resumed: Parties again appeared. Defendants adduced evidence and rested. Evidence concluded. Mr. Collins Denny moved to dismiss Supplemental and Amended Complaint re: Prince Edward School Board and Division Superintendent of School Board. Motion argued and ruling deferred until all arguments are completed. Mr. Denny reiterated motions previously made. Rulings deferred. Mr. J. Segar Gravatt renewed previous motions on behalf of Board of Supervisors. Rulings deferred. Matter partly argued. Adjournment.
July 27—	Trial Proceedings — resumed and concluded: Parties again appeared. Argument concluded. Decision reserved. Adjournment.
Aug. 7—	Summary of principles relied upon by Board of Supervisors of Prince Edward Co. received.

Docket Entries

Date	Proceedings
1961	
Aug. 25—	Memorandum opinion by the Court entered Aug. 23, 1961 and filed August 25, 1961 at nine o'clock A. M.
Sept. 29—	Statement of Court Reporter in sum of $338.00 to be taxed in costs, received.
Nov. 6—	In Chambers—Lewis, J.: Settlement of order argued.
Nov. 13—	Letter of J. Segar Gravatt showing payment to C. L. Craig, Reporter in sum of $338.00 received.
Nov. 15—	Notice of Application for writ of mandamus, with copy of petition for writ of mandamus of Leslie Francis Griffin, Jr., and copy of answer to petition for writ of mandamus, filed Nov. 13, 1961.
Nov. 15—	Order that report of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, be received and filed as a part of the record, ent. and filed.
Nov. 15—	Report of County School Board of Prince Edward County and T. J. McIlwaine, with Exhibits A, B, C and D attached, filed.
Nov. 17—	Order on opinion of Aug. 23, 1961 restraining "grant in aid" payments by Board of Supervisors and Treasurer of Prince Edward County, et al.; restraining Division Superintendent of Schools of Prince Edward County, the Superintendent of Public Instruction, et al. from processing or approving any applications for State scholarship grants; ordering Prince Edward County School Board to forthwith comply with order of April 22, 1961; denying prayer for injunctive relief in re: transfer or lease of school property; reserving decision upon all other issues raised in the

Date	Proceedings
1961	
	amended supplemental complaint and motions and answers of various defendants not specifically ruled upon; continuing cause, and directing clerk to mail attested copies of this order to sundry persons, entered and filed November 16, 1961.
Nov. 17	—Return of Clerk on order of Nov. 16, 1961, filed.
Dec. 6	—Reporter's Transcript of Trial Proceedings of July 24-27, 1961 (Vol. I), filed.
Dec. 6	—Reporter's Transcript of Trial Proceedings of July 24-27, 1961 (Vol. II), filed.
Dec. 15	—Notice of appeal from order entered Nov. 16, 1961 filed by Cocheyse J. Griffin, et al.
1962	
Jan. 19	—Motion for extension of time to docket appeal record, filed 1-18-62.
Jan. 19	—Order extending time to Mch. 16, 1962 for docketing appeal, entered 1-18-62.
Jan. 19	—Appeal Bond of $250.00 filed by plfs.
Feb. 28	—Order of U. S. Court of Appeals ent'd. Feb. 26, 1962 postponing issues raised by the appeal noted Dec. 15, 1961 until final adjudication of the entire case by the district court and until appeal is noted and perfected from the district court's final adjudication, received and filed Feb. 28, 1962. (Clerk, USCA mailed copies of order to counsel.)
Mar. 20	—Notice of application for extension of injunction filed by plaintiffs in open Court in Alexandria.

Date 1962	Proceedings

Mar. 22—Proceedings in open court in Alexandria (Lewis, J.). Motion came on this morning for application of extension of the injunction heretofore entered. Motion continued until such time as the Court has been advised that a final order has been entered by the Supreme Court of Appeals of Virginia. The extension of injunction shall continue until such time as this order is handed down. When order is handed down this court will hear the motion as soon thereafter as possible.

Mar. 26—Motion to substitute Annie Dobie Peebles & C. Stuart Wheatley, Jr. parties deft. in substitution for Gladys V. V. Morton & Wm. J. Story, Jr., filed by plfs.

Mar. 26—Notice of motion for further relief filed by plfs.

Mar. 26—Motion for further relief & final disposition of this case, filed by plfs.

Apr. 2—In Open Court—Lewis, J.: Appearances by counsel. Plaintiffs, by counsel, moved court to enter order extending injunction and moved to have date for hearing on application for further relief. Court declined to rule at this time. Matter continued. Clerk to notify all counsel of record that counsel or someone from their offices shall appear on April 4th at 10:00 a.m. for purpose of setting date.

Apr. 4—In Open Court—Lewis, J.: Appearances by counsel. Copy of decision of Supreme Court of Appeals of Virginia, filed. Plaintiffs, by counsel, moved to extend injunction. Opposed by defendants. Defendants allowed until May 1, 1962 to file their motions. Leave granted to file motion

Date 1962	Proceedings
	to dissolve existing injunction. Plaintiffs to file any motions by April 16, 1962. Court to enter order effective today enlarging present injunction to remain in full force and effect until further order of this court. All motions now filed or that may be filed set for hearing on May 18, 1962.
May 1	—Motion of defendants to dismiss or in the alternative to abstain from determining the issues presented in the amended supplemental complaint and to dismiss plaintiffs' motion for further relief, with exhibits "A", "B", "C", "D", & "E", filed.
May 1	—Motion of defendants Board of Supervisors of Prince Edward County, Virginia, and J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia, to dismiss the injunction entered herein on November 16, 1961, and further extended by order of , 1962, filed.
May 1	—Motion to dismiss motion for further relief; Motion to stay until questions of State Constitutional and Statutory construction raised therein are submitted to the supreme court of appeals of Virginia for construction; and Answer of the Board of Supervisors of Prince Edward County, Virginia, and J. W. Wilson, Jr., Treasurer thereto, filed.
May 1	—Motion of defendants County School Board of Prince Edward County, Virginia, and T. J. McIllwaine, Division Superintendent of Schools to dismiss the amended supplemental complaint for failure of proof, filed.

Docket Entries

Date 1962	Proceedings
May 1	Motion of defendants, County School Board of Prince Edward County, Virginia and T. J. McIllwaine, Division Superintendent of Public Schools, to Dismiss plaintiffs' motion for further relief, filed.
May 1	Answer of County School Board of Prince Edward County, Virginia, and T. J. McIllwaine, Division Superintendent of Schools, to a motion for further relief filed herein by the plaintiffs, filed.
May 1	Motion to dismiss filed by Woodrow W. Wilkerson, Colgate W. Darden, Lewis F. Powell, Jr., Ann Dobie Peebles, C. Stuart Wheatley, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., ind. and constituting the State Board of Education.
May 1	Answer of Woodrow W. Wilkerson, Supt. of Public Instruction, and Colgate W. Darden, Lewis F. Powell, Jr., Anne Dobie Peebles, C. Stuart Wheatley, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., ind. and constituting the State Board of Education, filed.
May 18	In Open Court—Lewis, J.: Appearances by counsel. Matter of filing action in Supreme Court of Appeals of Virginia for a determination under Sec. 129 of the Constitution of Virginia and motion to dismiss amended supplemental complaint argued by counsel.
May 23	Plaintiffs' Exceptions to entry of summary judgment, filed.

Docket Entries

Date 1962	Proceedings
May 25	Order granting motion for summary judgment as to cause of action alleged in Sec. V of the Amended Supplemental Complaint and dismissing sec. V; directing clerk to enter final judgment, ent. & filed May 24, 1962.
May 25	Final judgment in favor of School Board on the cause of action alleged in Sec. V of the Amended Supplemental Complaint, entered by Clerk May 25, 1962. Notice 77 D mailed counsel 6-8-62.
June 11	Notice of appeal from final judgment in favor of School Board on the cause of action alleged in Sec. V of the Amended Supplemental Complaint, filed by Cocheyse J. Griffin, et al., plaintiffs, filed.
June 26	Conference with counsel in chambers (Lewis, J.).
July 26	Memorandum opinion and Order of the Court directing School Board of Prince Edward County complete plans for admission of pupils in the elementary and high schools of the county without regard to race or color and to receive and consider applications to this end at the earliest practical date; proposed plans should be submitted to all counsel of record not later than 9-1-62 and to this Court on 9-7-62; granting motion to substitute successor defendants; granting motion to dismiss motion for further relief; denying motion to dismiss injunction entered on 11-16-61, and further extended 3-26-62; said injunction is effective only so long as the public schools of Prince Edward County remain closed; ent. July 25, 1962. and filed.

Docket Entries

Date 1962	Proceedings

Sept. 7—In Open Court—Lewis, J.: Messrs. S. W. & Otto Tucker, Robt. Carter, Henry Marsh, for plaintiffs; Messrs. Button, McIlwaine, Gray, Denny, Kay, Hicks, Rogers, Watkins and Gravatt for defendants. Order filing report of School Board entered. Report of School Board filed. Exception to Report of School Board filed by plaintiffs. Exceptions argued. Other matters argued. Notice of School Board for entry of order with proposed order attached, filed.

Sept. 28—Reporter's Transcript of Proceedings in Open Court on Sept. 7, 1962 filed.

Oct. 11—Motion of defendants to amend the findings contained in the memorandum opinion of July 25, 1962, to rehear and reconsider in part that opinion, and to abstain, filed in Chambers at Alexandria October 3, 1962.

Suggestion Re Court's Order, filed in Chambers at Alexandria October 3, 1962.

Memorandum opinion and order denying in its entirety defendants' motion in Chambers that the Court amend its findings as set forth in its Memorandum Opinion of July 25, 1962 and to rehear and consider in part that opinion, and to abstain upon the grounds set forth in the motion; amending par. 2 of page 3, line 7 and and par. 2 of page 11, line 9 on oral motion of defendants and denying other requested amendments, entered and filed Oct. 10, 1962.

Order denying defendants' motion for stay; ordering School of Prince Edward County to submit the Pupil Placement Board assignment plan to the court forthwith for review and approval, if

Date	Proceedings
1962	
	the School Board relies upon the validity of the Plan; incorporating Court's Memorandum Opinion of July 25, 1962 as a part of this order by reference; setting forth previous findings by the court; adjudging that the public schools of Prince Edward County may not be closed to avoid the effect of the law as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open; denying defendants' motion to dismiss, or in the alternative to abstain from determining the issues presented in the amended supplemental complaint; granting defendants' motion to dismiss the plaintiffs' motion for further relief; granting plaintiffs' motion to substitute successor defendants and substituting Anne Dobie Peebles and C. Stuart Wheatley, Jr., individually and as members of the State Board of Education for Gladys V. V. Morton and William J. Story as parties defendant; denying defendants' motion to dissolve the injunction of Nov. 16, 1961 which was further extended on March 26, 1962; extending injunction of Nov. 16, 1961 so long as the public schools of Prince Edward County remain closed; deferring entry of further orders as may be necessary and proper to require full compliance with this decree pending review by the United States Court of Appeals for the Fourth Circuit and the Supreme Court of the United States, providing such appeal is noted and perfected within the time provided by law, entered and filed October 10, 1962 (copies of this order and copy of opinion mailed counsel Oct. 11, 1962).
Oct. 17	—Notice of appeal filed by plfs. from order of 10-10-62.

Order On Mandate

As directed by the United States Court of Appeals for the Fourth Circuit, and upon motion of the plaintiffs, the defendants having advised the Court that they did not desire to be heard thereon, the Court does hereby ADJUDGE, ORDER and DECREE:

1. That the judgment entered by this Court on the 26th day of November, 1958, be, and it hereby is, vacated to the extent that it relieves defendants of the necessity of complying with the terms of the injunction heretofore entered in this case until the beginning of the school year 1965 and to the extent that it limits the recovery by the plaintiffs from the defendants to an amount chargeable for one copy of the transcript of the proceedings.

2. That the defendants, the County School Board of Prince Edward County, T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, their agents and employees and successors in office, and all persons acting in concert with them, be, and they hereby are, restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.

3. That the defendants make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this end at the earliest practical day.

4. This decree does not relieve the plaintiffs, and other persons similarly situated, of the necessity of observing state laws as to the assignment of pupils to classes in the

public schools of the County so long as such laws do not cause or allow discrimination based on race or color, and the administrative remedies provided in such laws must be exhausted before application is made to this Court for relief on the ground that this injunction is being violated.

5. That in addition to the costs heretofore allowed the plaintiffs they are hereby allowed the sum of $770.25 as additional costs for transcripts of the proceedings in this action.

6. That until the further order of this Court this action shall be retained on the docket of this Court for such further proceedings as may be necessary, and the Court reserves the power to enlarge, reduce or otherwise modify the provisions of this decree.

To which action of the Court, the defendants, by counsel, objected and excepted.

Dated: April 22, 1960

s/ ALBERT V. BRYAN
United States District Judge

Amended Supplemental Complaint

Plaintiffs present this, their supplemental complaint, leave having been granted by this Court to do so, against the County School Board of Prince Edward County, Virginia, T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, The Board of Supervisors of Prince Edward County, Virginia, J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia, Garland Gray, Lewis F. Powell, Jr., Gladys V. V. Morton, William J. Story, Jr., Leonard G. Muse, Louise F. Galleher, and Mosby Garland Perrow, Jr., individually and as constituting the State Board of Education, and Woodrow W. Wilkerson, Superintendent of Public Instruction, and aver as follows:

I

1. On May 5, 1959, the United States Court of Appeals for the Fourth Circuit reversed and remanded the judgment theretofore entered in this case and directed this Court to enter an order requiring defendant School Board and Division Superintendent of Schools to commence the desegregation of the public schools of Prince Edward County in September 1959. As required by said mandate this Court, by order entered the 22nd day of April, 1960, restrained and enjoined the defendants The County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, and all persons acting in concert with them, from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by said defendants in the county and required that said defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color and make plans for the admission of pupils in the elementary schools of the

county without regard to race or color and to receive and consider applications to such end at the earliest practical day.

2. All public schools in Prince Edward County have been and have remained closed since the end of the 1958-59 school term. An efficient system of public free schools is established and maintained in every county and corporation in this Commonwealth, as required by §§ 129, 130, 132 and 136 of the Constitution of Virginia, other than in the County of Prince Edward. Consequently, the plaintiffs, and all members of the class which they represent, as well as all other children of public school age residing in Prince Edward County, have been and are being denied public free education contrary to and in violation of § 129 of the Constitution of Virginia and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

II

3. Section 136 of the Constitution of Virginia and §22-116 of the Code of Virginia, 1950, as amended, make it the duty of the Board of Supervisors of Prince Edward County to provide for the levy and collection of local school taxes and the appropriation of funds thus acquired to be apportioned and expended by the defendant School Board in establishing and maintaining public schools in said county.

4. Soon after the abovementioned remand of this case and in anticipation of the order of this Court which was thereafter entered, the defendant Board of Supervisors of Prince Edward County acting under purported discretionary power granted by legislation enacted at the Special Session of the General Assembly, 1959, to-wit, §22-127 of

the Code of Virginia of 1950, as amended, and notwithstanding the budgetary recommendation of the defendant School Board, failed and refused to make any levy or appropriation for public school purposes for the school year 1959-60. Moreover, the defendant Board of Supervisors has not made and does not intend to make any levy or appropriation for maintenance and operation of public free schools in the County of Prince Edward for the school year 1960-61, or any school year in the foreseeable future.

5. At its June 1959 meeting, said Board of Supervisors fixed the levies for the year 1959 at $1.60 per one hundred dollars of assessed valuation on all taxable real estate and tangible personal property located in the county elsewhere than in the Town of Farmville, where the levy on such property was fixed at $1.50 per one hundred dollars of assessed valuation, and at $0.30 per one hundred dollars of assessed valuation on all personal property classified as merchants' capital invested in businesses located in said county. The corresponding levies for the years 1957 and 1958 were and had been $3.40, $3.30 and $0.80, respectively.

6. Sometime after the decision of the Supreme Court in this case, there was created in said county an organization known as Prince Edward School Foundation, the purpose of which is to operate elementary and secondary schools in said county in partial substitution for public schools, thus to provide education for white children residing in said county. Since the beginning of the school term 1959-60, said foundation has operated such a school or such schools in said county for white children, representing such school or schools as being private, non-profit and non-sectarian. No other person, firm, association or corporation is known or believed to have operated a private, non-profit, non-sectarian school of elementary or secondary level in said county at any time since the beginning of the school

year 1959-60 or at any prior time which would be material here.

7. At its June 1960 meeting said Board of Supervisors fixed the levies for the year 1960 at $4.00 per one hundred dollars of assessed valuation on all taxable real estate and tangible personal property located in said county elsewhere than in the Town of Farmville, where the levy on such property was fixed at $3.90 per one hundred dollars of assessed valuation, and at $0.80 per one hundred dollars of assessed valuation on all personal property classified as merchants' capital invested in businesses located in said county.

8. At its said June 1960 meeting, said Board of Supervisors proposed and at its meeting held July 18, 1960 it enacted an ordinance (adopted under Chapter 191, Acts of the General Assembly of 1960, being §58-19.1 of the Code of Virginia) to provide that contributions made by persons to certain non-profit, non-sectarian private schools shall constitute a credit against the liability of any such person for certain taxes otherwise payable to Prince Edward County, etc. Among other things said ordinance provides that upon receipt of the taxpayer's affidavit of the fact of such contribution and related matters and supporting evidence of payment, the Treasurer of the County of Prince Edward "shall deduct from the amount of taxes due the County of Prince Edward by such person, firm, association, corporation or other taxpayer on account of real estate taxes or personal property taxes the amount of such contribution, in no event to exceed 25 per centum of the total taxes due the County of Prince Edward on real estate and personal property by such taxpayer." A copy of said ordinance as, prior to its enactment, it was published in the Farmville Herald, a newspaper published in said county, is herewith filed, marked "Exhibit 'Supp. A' ".

9. At its said June 1960 meeting said Board of Supervisors proposed, and at its meeting held July 18, 1960, it enacted an ordinance (adopted under Chapter 461, Acts of the General Assembly of 1960, being §22-115.37 of the Code of Virginia) "to encourage the education of certain children in Prince Edward County by appropriating funds for educational purposes in furthering the elementary and secondary education of such children", etc. A copy of said ordinance as, prior to its enactment, it was published in said Farmville Herald, is herewith filed, marked "Exhibit 'Supp. B.'" Pursuant to this ordinance said Board of Supervisors by resolution passed at subsequent meetings has appropriated and caused to be paid from the general tax fund sums of money, averaging $50.00 for each child, aggregating more than $65,000.00, all or most of which was paid to or in reimbursement for sums paid to said Prince Edward School Foundation for education of white children residing in said county.

10. At and prior to the time of the proposal of the above-mentioned ordinances and at all times thereafter, said Board of Supervisors and each member thereof knew that the only person, firm, association or corporation which operated or claimed to operate a private, non-profit, nonsectarian school of elementary or secondry level located within said county was the said Prince Edward School Foundation, that said Foundation was organized to provide educational opportunities for white children only, and that said Foundation had been organized for the purpose of avoiding the attendance of white children and colored children at the same public schools. The enactment and execution of said ordinances serve merely to provide, within said county and at public expense, elementary and secondary education for white children residing in said county while such education for Negro children similarly situated is totally denied.

11. The foregoing actions of the defendant Board of Supervisors result from and reflect a deliberate, intentional and calculated purpose to circumvent and frustrate the order of this Court as anticipated at the time the Board first failed and refused to appropriate money for public schools for the 1959-60 session and as thereafter entered. The aforesaid action by the defendant Board of Supervisors has rendered and will render said order unenforceable and ineffective unless the relief prayed herein is granted.

III

12. J. W. Wilson, Jr., is the Treasurer of the County of Prince Edward. On information and belief, plaintiffs allege that, under purported authority of the ordinance mentioned and referred to in paragraph numbered 9, he has given tax credits for contributions made to said Prince Edward School Foundation and, unless restrained, will continue to do so.

IV

13. The Constitution of Virginia (Sections 130 through 135) creates the State Board of Education and the office of Superintendent of Public Instruction, vests the general supervision of the state-wide system of public free schools in said State Board, generally defines the powers and duties of said Board, provides for a permanent and perpetual literary fund (all or part of which the General Assembly may set aside for public school purposes), and gives to the State Board the management and investment of the school fund under regulations prescribed by law. With respect to the administration of the public free school system, further duties of the State Board of Education and of the Superintendent of Public Instruction are set forth in Title 22 [Education] of the Code of Virginia, as amended, e.g., §§ 22-1, 22-2, 22-6, 22-9.1, 22-9.2, 22-11 through 22-40, 22-72, 22-101 through 22-146.11, 22-159.

14. Neither the defendant State Board of Education, the defendant Superintendent of Public Instruction, nor any other State official acted to discharge the State's constitutional obligation to provide and maintain an efficient system of public free schools in Prince Edward County as required by §§ 129 to 136, inclusive, of the Constitution of Virginia and §§ 22-11 to 22-29, inclusive, of the Code of Virginia of 1950, as amended.

15. Plaintiffs, on information and belief, allege that, from funds which would have been available for public schools in Prince Edward County if public schools there were not closed, the State Board of Education has approved grants for the school year 1960-61 to more than one thousand white children in Prince Edward County in sums aggregating more than one hundred thousand dollars, in aid of the attendance of said children at the school or schools operated by said Prince Edward School Foundation.

V

16. Plaintiffs are informed, and on information and belief allege, that defendant County School Board is considering and contemplating the conveyance, lease or transfer of the public schools and public school property of Prince Edward County to some private corporation, partnership, association or individual pursuant to §§ 22-161, 22-164.1 and 22-164.2 of the Code of Virginia, as amended, and that the defendants by causing and permitting the public school facilities in said county to fall into disuse, and by other means as well, are making possible and encouraging the sale and conveyance of the public schools and public school property of said county pursuant to §§ 22-161.1 through 22-161.5 of the Code of Virginia of 1950, as amended.

VI

17. The hereinabove related action, inaction, and contemplated action of each and all of the defendants was, has been, and will be taken for the sole purpose of circumventing and frustrating the enforcement of the order of this Court requiring the racial desegregation of the public schools of Prince Edward County, in violation of the rights of these plaintiffs and the class they represent as guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States as established in this case.

18. Plaintiffs and those similarly situated and affected, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the hereinabove related action, inaction and contemplated action of each and all of the defendants. Plaintiffs have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than as herein prayed.

WHEREFORE, plaintiffs pray that the Court enter an order enjoining and restraining the defendants, their officers, agents, servants, employees, attorneys, successors or assigns, or persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise:

(a) From refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia;

(b) From expending public funds for the direct or indirect support of any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated;

(c) From expending public funds in aid of, or in reimbursement of money paid for, the attendance of any

child at any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated;

(d) From crediting any taxpayer with any amount paid or contributed to any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated; and

(e) From conveying, leasing, or otherwise transferring title, possession or operation of the public schools and facilities incidental to the operation thereof in Prince Edward County, Virginia, to any private corporation, association, partnership or indivdual.

And plaintiffs further pray that they be allowed their costs and such other, further and general relief as the Court may deem justiciable.

S. W. TUCKER,
Of Counsel for Plaintiffs.

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Answer of School Board of Prince Edward County to Amended Supplemental Complaint

School Board of Prince Edward County, Virginia, answering the Amended Supplement Complaint permitted to be filed herein, avers:

I

1. It admits that the United States Court of Appeals for the Fourth Circuit on May 5, 1959, reversed and remanded the judgment theretofore entered by this Court in this case and directed that this Court enter a certain order; the summation of that order found in paragraph No. 1 of the Amended Supplemental Complaint is not accurate; the nature and extent of the order directed to be entered is found in the opinion of said Court of Appeals.

2. It admits that on April 22, 1960, this Court entered an order as directed by the Court of Appeals, the pertinent provisions of which are set forth in the second sentence of paragraph No. 1 of the Amended Supplemental Complaint.

3. The original Complaint in this case was based upon the proposition that segregation of the races in the schools operated by this defendant violates the Federal Constitution and upon the further ground that if segregation accompanied by equality of treatment is valid, the facilities afforded colored pupils in the high schools operated by this defendant were grossly inferior to those furnished white pupils.

4. The latter ground was eliminated by the decision of the Supreme Court of the United States handed down May 17, 1954, wherein it was held that to such extent as the State may undertake to provide education, it must make the same available to all on equal terms without racial distinction.

Answer of School Board of Prince Edward County to Amended Supplemental Complaint

5. Neither said Supreme Court nor said Court of Appeals nor this Court has decided that this defendant must operate schools in Prince Edward County, Virginia, or that any "public" schools (public in the sense that they are owned and controlled by the Commonwealth of Virginia or any legal subdivision thereof) must be operated in Prince Edward County, Virginia.

6. The Amended Supplemental Complaint is based upon the fallacious assumption that the order of April 22, 1960, requires that this defendant operate schools in the County. At the time said order was entered, this defendant had not operated any schools since June of 1959; that was a fact of wide public knowledge; and it was known to the plaintiffs and their attorneys and it was known to this Court.

7. It admits the allegation of the first sentence of paragraph No. 2 of the Amended Supplemental Complaint.

8. It admits that in every other county, city, and town constituting a separate school district public schools are operated by the local school boards. The schools in the several districts are not uniform. Those operated by some local school boards are much more extensive and complete than those operated by other local school boards.

9. It is denied that §§129, 130, 132, and 136 of the Constitution of Virginia, or any other provisions of that Constitution, require the operation of public free schools in every location of the Commonwealth. Said Constitution does not require that public free schools be operated in every locality. It leaves to the locality whether any money will be raised by local taxes for the support of public schools, and the extent, if any, of the educational opportunities which will be furnished by a system of public free

schools, subject only to the qualification found in §136 of the Constitution that such primary schools as may be established in any school year shall be maintained at least four months of that school year before any part of such local monies is devoted to the establishment of schools of the higher grades.

10. It is denied that the plaintiffs or any other children of public school age residing in Prince Edward County are being denied any rights in violation of §129 of the Constitution of Virginia or of the Due Process or of the Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

II

11. With the exception of one clause in paragraph No. 4 of the Amended Supplemental Complaint, the allegations of Sections II, III, and IV of said Amended Supplemental Complaint relate to no action of this defendant, County School Board, and charge nothing against it. However, the Court having overruled the motion of this defendant to dismiss as to its said sections, this defendant believes it is incumbent upon it to answer those allegations.

III

12. It is denied that §136 of the Constitution of Virginia or that §22-116 of the Code of Virginia (Acts, 1928, page 1200) make it the duty of the Board of Supervisors of Prince Edward County to provide for the levy and collection of local school taxes and the appropriation of funds thus acquired to be apportioned and expended by this defendant in establishing and maintaining public schools in the County. Said sections, when properly construed, make

it discretionary with said Board of Supervisors whether it will levy and collect any such taxes.

13. Not only do the constitutional and statutory provisions now in effect in Virginia make it discretionary with the Board of Supervisors of Prince Edward County whether or not it will provide for the levy and collection of local school taxes, et cetera, but this defendant further avers that throughout the whole history of public schools in the Commonwealth of Virginia, from the very first act entitled "An Act to Establish Public Schools", adopted December 22, 1796 (see page 354 of "A Collection of All Such Acts of the General Assembly of Virginia of a Public and Permanent Nature as Are Now in Force" published pursuant to an Act of the General Assembly passed on the 26th day of January, 1802, generally referred to as the "Code of 1802"), it has been left to the discretion of county authorities whether any local taxes should be levied and collected for the support of public schools within the county.

14. As alleged in the first sentence paragraph No. 4 of said Amended Supplemental Complaint, it is admitted that this defendant made to the Board of Supervisors of the County budgetary recommendations of the estimate deemed to be needed for the support of public schools during the school year 1959-60 and in the alternative the amount of money deemed to be needed for educational purposes of the County pursuant to Acts of Assembly, Extra Session 1959, Chapter 79, Section 1, codified as §§22-120.3 and 22-120.4 of the Code of Virginia.

15. It is denied as alleged in said paragraph No. 4 of the Amended Supplemental Complaint that shortly after May 5, 1959, the Board of Supervisors of said County took any action under §22-127 of the Code of Virginia as amend-

ed (Acts, Extra Session 1959, Chapter 79, Section 1), or relied upon said section in failing or refusing to take any action. It is admitted that said Board of Supervisors made no levy or appropriation for public school purposes for the school year 1959-60.

16. With reference to the last sentence of paragraph No. 4 of the Amended Supplemental Complaint, this defendant admits that no levy or appropriation for maintenance and operation of public free schools in said County was made by said Board of Supervisors for the school year 1960-61 and that none has been made for the school year 1961-62.

17. This defendant admits the allegations of paragraph No. 5 of the Amended Supplemental Complaint.

18. This defendant admits that a number of citizens of the County organized a non-profit, non-stock corporation under the laws of the Commonwealth of Virginia known as Prince Edward School Foundation, and it says that said corporation was organized in May of 1959. This defendant avers that neither the Board of Supervisors of the County nor this defendant nor any official of said County participated in the organization of said Prince Edward School Foundation, controls or influences its actions, and neither this defendant nor said Board of Supervisors nor any official of said County is in any respect responsible for the activities and policies of said Foundation.

19. This defendant is not aware that the purpose of said Foundation is as alleged in the first sentence of paragraph No. 6 of the Amended Supplemental Complaint, and it, therefore, denies the allegations thereof.

20. This defendant admits that with the beginning of the school year 1959-60 said Foundation has operated pri-

vate, non-profit and non-sectarian schools in said County. In other respects it is not informed whether the allegations of the second sentence of paragraph No. 6 are true or false, and it, therefore, denies the same.

21. The allegations of the third sentence of paragraph No. 6 of the Amended Supplemental Complaint are denied.

22. This defendant admits the allegations of paragraph No. 7 of the Amended Supplemental Complaint.

23. This defendant neither admits nor denies the allegations of paragraph No. 8 of said Amended Supplemental Complaint and calls for strict proof of same.

24. This defendant neither admits nor denies the allegations of the first sentence of paragraph No. 9 of said Amended Supplemental Complaint and calls for strict proof of same.

25. This defendant is not informed of the accuracy of the allegations of the last sentence of paragraph 9 of the Amended Supplemental Complaint and, therefore, denies the same.

26. This defendant is not informed of the truth or falsity of the allegations of the first sentence of paragraph 10 of the Amended Supplemental Complaint and it, therefore, denies the same.

27. This defendant denies the allegations of the second sentence of paragraph No. 10 of said Amended Supplemental Complaint and says that those allegations are simply a figment of the imagination of counsel since said ordinances make no provision for white children as such and make no provision for colored children as such, but make provision for children residing in the County of any race

and color whatsoever. This defendant is advised that said ordinances are administered without reference to race, and equally for all children.

28. This defendant is not informed of the truth or falsity of the allegations of the first sentence of paragraph No. 11 of the Amended Supplemental Complaint and, therefore, denies the same. It further avers that the purpose of said Board of Supervisors is without legal consequence because the Board of Supervisors having been empowered by valid law to take the actions alleged, and the wisdom or lack of wisdom thereof being a political and not a judicial question, the purpose or the motive of the Board of Supervisors and of the individual members thereof is not a matter for judicial inquiry.

This defendant avers that said order has not been rendered unenforceable or ineffective by any action of the Board of Supervisors or any failure of said Board to act, but that said order is today in full force and effect in said County and is being obeyed by this defendant, and so far as this defendant is aware by every person and agency, public and private in the County, as well as in the Commonwealth.

IV

29. This defendant admits that J. W. Wilson, Jr., is Treasurer of the County of Prince Edward.

30. This defendant is not informed of the truth or falsity of the other allegations of paragraph No. 12 of the Amended Supplemental Complaint and, therefore, denies the same.

V.

31. This defendant avers that the content and scope of §§ 130 through 135 of the Constitution of Virginia are

not set forth with accuracy or with reasonable completeness in paragraph No. 13 of the Amended Supplemental Complaint. It says that the content and scope of said sections, as well as the provisions of the Virginia Code listed in said paragraph, are to be obtained from a perusal thereof.

32. The State Board of Education and the Superintendent of Public Instruction have no powers or duties save as the same are conferred by the Constitution or laws of Virginia. No provision of the Constitution of Virginia or of the law of Virginia lays on the Commonwealth of Virginia the obligation to provide and maintain public free schools in Prince Edward County. No provision of the Constitution of Virginia or the laws of Virginia lays upon the State Board of Education, the Superintendent of Public Instruction or any other official of the Commonwealth of Virginia the obligation to provide and maintain any public schools in the County of Prince Edward. The allegations of paragraph No. 14 of the Amended Supplemental Complaint are accordingly denied.

33. The defendant denies the allegations of paragraph No. 15 of the Amended Supplemental Complaint.

VI

34. This defendant denies the allegations of paragraphs Nos. 16, 17 and 18 of the Amended Supplemental Complaint.

VII

35. This defendant avers that it has not refused to maintain and operate public free schools in Prince Edward County, Virginia. It avers that there has been by this

defendant, and so far as it knows by others, no circumvention or frustration of the order of this Court entered on April 22, 1960, or attempt to circumvent or to frustrate it.

COLLINS DENNY, JR.
Of Counsel for Defendant, County School Board of Prince Edward County, Virginia

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Counsel for County School Board of Prince Edward County, Virginia

Answer of T. J. McIlwaine to Amended Supplemental Complaint

Your defendant, T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, Virginia, in answer to the Amended Supplemental Complaint avers:

1. Said Amended Supplemental Complaint makes no allegation concerning this defendant; it charges him with no action; it charges him with no dereliction; and it asks for no relief against him.

2. To such extent, if any, as the allegations of said Amended Supplemental Complaint have any reference to him or involve him, he adopts the answer filed by the County School Board of Prince Edward County, Virginia, to said Amended Supplemental Complaint.

T. J. McIlwaine,
By Collins Denny, Jr.,
Of Counsel.

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Collins Denny, Jr.

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C. F. Hicks
DeHardit, Martin & Hicks
Gloucester, Virginia
Counsel for T. J. McIlwaine.

Answer of the Board of Supervisors of Prince Edward County to Amended Supplemental Complaint

The defendant, the Board of Supervisors of Prince Edward County, Virginia, for answer to the Amended Supplemental Complaint says:

1. That all matters alleged in Paragraph 1 are of record in this action and the defendant relies upon said record.

It admits that insofar as it is informed public schools have not been operated in the County of Prince Edward since the conclusion of the school term 1958.

2. It denies that Sections 129, 130, 132 and 136 of the Constitution of Virginia requires the operation of schools in any county or corporation in the Commonwealth of Virginia.

It is not advised as to what schools are operated in other counties or corporations in the Commonwealth of Virginia, but denies that such schools as are operated in such other counties or corporations are operated in pursuance or by reason of the requirement of Sections 129, 130, 132 and 136 of the Constitution of Virginia.

It denies that Sections 129, 130, 132 and 136 of the Constitution of Virginia, or any other provision thereof, have been violated by action of this defendant. It denies that the complainants or any class of children or any child residing in Prince Edward County have or has been denied education in violation of the Constitution of Virginia or in violation of the Due Process or Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States.

On the contrary, it alleges that its action with respect to public education and the offering of free education in the County of Prince Edward are in accord with lawful powers vested in it under the Constitution and Laws of the Com-

monwealth of Virginia and that in the exercise of these powers no rights of the complainants or any class of children or any child residing in Prince Edward County have been violated or denied.

3. It denies that Section 136 of the Constitution of Virginia and Section 22-116 of the Code of Virginia impose a mandatory or other duty upon the Board of Supervisors of Prince Edward County to levy, collect or appropriate taxes to be expended by the School Board of Prince Edward County in establishing and maintaining public schools in the said County.

On the contrary, it alleges that said sections along with other provisions of the Constitution of Virginia and of the Code of Virginia repose discretion with the Board of Supervisors with respect to the levy and collection of taxes and with respect to the appropriation of funds, the same having been collected.

It further alleges that the discretion reposed in the Board of Supervisors with respect to the levy and collection of taxes for public schools is not dependent upon any legislation enacted by the General Assembly of Virginia in recent years, but has been a discretionary power vested in the said Board of Supervisors of the counties and Councils of the cities and towns constituting school districts within the Commonwealth of Virginia since the inception of public support of education in the Commonwealth.

4. It admits that it has made no levy and has appropriated no funds derived from local revenue to the School Board of Prince Edward County for the operation of public schools.

It denies that it acted in pursuance of purported discretionary power granted it by legislation enacted at the

Special Session of the General Assembly 1959, to-wit, Section 22-127 of the Code of Virginia 1950, as amended, but avers that its action is in pursuance of discretionary powers vested in it under provisions of the Constitution of Virginia and under and by virtue of enactments of the General Assembly in force long prior to the issuance of original process in this action.

It further admits that it did not make a levy or appropriate funds to the School Board for the operation of public schools in 1960-61 and has not made such levy or appropriation for the year 1961-62, which action on its part it alleges is lawful in all respects.

5. It admits the allegations contained in Paragraph 5 and alleges that the said action is lawful in all respects.

6. It admits that the Prince Edward School Foundation operates private, non-profit, non-sectarian schools within the County of Prince Edward. It is not informed of the policies of the said Prince Edward School Foundation and, therefore, denies the allegation with respect thereto contained in the first sentence of Paragraph 6.

It denies that no other person, firm, association or corporation has operated private, non-profit, non-sectarian schools of elementary or secondary level within said County.

This defendant further avers that neither the Board of Supervisors of the County of Prince Edward nor any member thereof, nor any official of the said County participated in the organization of said Prince Edward School Foundation, nor does the said Board, any of its members, or any official of the County control or influence the action or policy of the said Foundation.

Answer of the Board of Supervisors of Prince Edward County to Amended Supplemental Complaint

7. Defendant admits the allegations contained in Paragraph 7.

8. It admits the adoption of the Ordinance mentioned in Paragraph 8 and files a certified copy herewith marked "Exhibit 'Ordinance 1' ".

9. The defendant admits the adoption of the Ordinance referred to in Paragraph 9 and files a certified copy herewith marked "Exhibit 'Ordinance 2' ".

It further admits that appropriations were made without regard to race, which, when taken with similar appropriations under State law, were adequate for the educational needs of all children of the said County without regard to race, that all such funds were paid to the parents or guardian of children entitled thereto without regard to the race of said child and without regard to the school wherein the child received educational training otherwise than as specified in said ordinance.

This defendant not being advised of the amount of money expended by parents and guardians of children residing within the County, nor of the amount received by such parents or guardians of children within said County from the State of Virginia or from any other source in furtherance of the educational needs of such children, and not being advised of the person, firm or corporation to whom such parents or guardians may have paid funds for the education of children residing within the said County, the allegation contained in the last sentence of Paragraph 9 is denied.

10. This defendant denies the allegations contained in Paragraph 10.

The defendant further alleges that the ordinances referred to in the said paragraph were enacted in furtherance

of education of children residing within the County of Prince Edward under powers vested in it under the Constitution of Virginia and Acts of the General Assembly of Virginia and for the equal benefit of all children of the said County without regard to race.

It denies that the effect of the said ordinance is to deny education to Negro children while providing the same for white children. On the contrary, it avers that the legal effect of the ordinances is to further educational opportunity of all children resident of the County without regard to race and to further the freedom of parents guaranteed under the First and Fifth Amendments of the Constitution of the United States to choose the school or schools in which their children should receive mental training; that the enactment of these ordinances in no way denied Negro children similarly situated any educational right, opportunity or privilege which was afforded to white children, and that any failure of Negro parents to take advantage of educational opportunities thus afforded is in no wise attributable to the enactment of said ordinances, but resulted solely from the free choice of the parents of said children.

11. This defendant denies the allegations contained in Paragraph 11.

It alleges further that its actions as alleged in the first ten paragraphs of the Amended Supplemental Complaint (1) were not intended and do not as a matter of law violate the order of this Court entered on April 22, 1960; (2) that all such actions were taken in pursuance of lawful discretionary power and authority vested in it under the Constitution of Virginia and Statutes enacted in pursuance thereof; (3) that such discretionary legislative power has been exercised in conformity with the Fourteenth Amend-

ment of the Constitution of the United States; (4) that such actions have been taken in furtherance of freedom of parents guaranteed by the First and Fifth Amendments of the Constitution of the United States with respect to the education and training of their children.

It further alleges that the order of this Court is in full force and effect within the County of Prince Edward and that the same has not been circumvented or frustrated, and that the actions of the Board of Supervisors do not constitute nor reflect a deliberate, intentional and calculated purpose to circumvent or frustrate said order.

12. This defendant admits that J. W. Wilson, Jr. is Treasurer of Prince Edward County, that his duties under and by virtue of the ordinances referred to in the Amended Supplemental Complaint are ministerial duties under the ordinances referred to.

13, 14 & 15. This defendant not being sufficiently advised as to the factual allegations contained in Paragraphs 13, 14 & 15 to form any belief with respect thereto deny all such factual allegations.

As to all allegations contained therein charging a constitutional obligation upon the State Board of Education or the Superintendent of Public Instruction to operate public free schools within the County of Prince Edward, the same are denied.

16. This defendant has no legal responsibility whatsoever with respect to the matters alleged in Paragraph 16 and is not sufficiently informed with respect to the factual allegations contained therein to form a belief with respect thereto and, therefore, denies the factual allegations therein contained.

Answer of the Board of Supervisors of Prince Edward County to Amended Supplemental Complaint

17. This defendant denies the allegations contained in Paragraph 17.

It further alleges that the order of this Court entered on April 22, 1960 has not been circumvented or frustrated, or that any rights of the plaintiff or the class they represent under the Due Process or Equal Protection Clause of the Fourteenth Amendment of the Constitution as established by the said order of April 22, 1960 have been violated or denied, and denies that it has acted independently or in concert with any other agency, person, firm or corporation for the purpose of circumventing or frustrating the enforcement of the order of April 22, 1960 and alleges that the actions charged against it in the Amended Supplemental Complaint are lawful actions under the laws and Constitution of Virginia and in furtherance of the individual freedom of parents with respect to the education of children guaranteed by the First and Fifth Amendments of the Constitution of the United States and that none of said actions violate any right of the plaintiffs or of any class of children within the County of Prince Edward under the Due Process or Equal Protection Clause of the Constitution of the United States.

18. It denies that the plaintiffs are suffering irreparable injury, or threatened with irreparable injury by reason of any action, inaction or contemplated action of this defendant, or of all of the co-defendants, in manner and form as alleged in the Amended Supplemental Complaint, but, on the contrary, it alleges that any alleged injury suffered has been the direct, voluntary and sole result of the choice and decision of the plaintiffs, and those similarly situated, or their parents, or of others in position to influence them, and is in no wise legally attributable to

this defendant, nor to all of the defendants, as alleged in the Amended Supplemental Complaint.

This defendant further alleges that the plaintiff has a plain, adequate and complete remedy for a redress of the alleged wrongs and illegal acts complained of in the Amended Supplemental Complaint by an action in the appropriate court or courts of the State of Virginia to enforce the alleged mandatory constitutional obligation alleged to rest upon this defendant and all other co-defendants under said Constitution and laws of the State of Virginia to operate free public schools within the County of Prince Edward, as set forth in the said Amended Supplemental Complaint.

THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY

By: FRANK NAT WATKINS
Commonwealth's Attorney of Prince Edward County

J. SEGAR GRAVATT
Special Counsel

Answer of J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia

The defendant, J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia, for answer to the Amended Supplemental Complaint says:

1. That he is the Treasurer of the County of Prince Edward.

2. That he knows nothing with respect to the allegations contained in the Amended Supplemental Complaint except as to the allegations contained in Paragraph 12 and Paragraph 17 of the said Amended Supplemental Complaint.

As to Paragraph 12, the said J. W. Wilson, Jr. admits that he has given tax credit for contributions made as provided by the ordinance mentioned in Paragraph 12 of the Amended Supplemental Complaint and that some of the tax credits have been for contributions made to the Prince Edward School Foundation; that his duties under the said ordinance are ministerial duties; that he stands ready to supply such information from the records of his office as the court may direct or as may be requested.

With respect to the allegation contained in Paragraph 17, he denies that he has acted with any purpose of circumventing or frustrating the enforcement of the order of this Court referred to in said paragraph in violation of the rights of the plaintiff, or of any other person, and denies that any action which he has taken, or any failure to act, or any contemplated action on his part has or will be taken for the purpose of circumventing and frustrating the order of this Court or in violation of the rights of any person.

J. W. Wilson, Jr.
By: J. Segar Gravatt,
His Attorney.

Answer of Woodrow W. Wilkerson, Superintendent of Public Instruction, *et al.*

Now come Woodrow W. Wilkerson, Superintendent of Public Instruction, and Colgate W. Darden, Lewis F. Powell, Jr., Gladys V. V. Morton, William J. Story, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., individually and constituting the State Board of Education, and answer the amended supplemental complaint herein and say:

1. For answer to Paragraph 1 of the amended supplemental complaint, these defendants say that the decision of the United States Court of Appeals for the Fourth Circuit in this case, dated May 5, 1959, and the order of this Court entered April 22, 1960, speak for themselves and no answer to said paragraph is required of these defendants.

2. The allegation of the first sentence of Paragraph 2 of the amended supplemental complaint is admitted; the remaining allegations of said Paragraph 2 are denied.

3. The allegations of Paragraph 3 of the amended supplemental complaint are denied.

4. These defendants neither admit nor deny the allegations of Paragraphs 4, 5, 6, 7, 8, 9 and 10 of the amended supplemental complaint.

5. The allegations of Paragraph 11 of the amended supplemental complaint are denied.

6. These defendants admit the allegation of the first sentence of Paragraph 12 of the amended supplemental complaint; the remaining allegations of said Paragraph 12 are neither admitted nor denied.

7. For answer to Paragraph 13 of the amended supplemental complaint, these defendants say that the various provisions of the Constitution of Virginia and Code of Virginia specified in said Paragraph 13 speak for themselves,

and no answer to the allegations of said Paragraph 13 is required of these defendants.

8. For answer to Paragraph 14 of the amended supplemental complaint, these defendants deny that they have failed to discharge any duty imposed upon them by any law of the Commonwealth of Virginia.

9. The allegations of Paragraph 15 of the amended supplemental complaint are denied.

10. These defendants neither admit nor deny the allegations of Paragraph 16 of the amended supplemental complaint.

11. The allegations of Paragraphs 17 and 18 of the amended supplemental complaint are denied.

Now, having fully answered, these defendants pray to be hence dismissed with their costs in this behalf expended.

WOODROW W. WILKERSON,
Superintendent of Public Instruction

COLGATE W. DARDEN
LEWIS F. POWELL, JR.
GLADYS V. V. MORTON
WILLIAM J. STORY, JR.
LEONARD G. MUSE
LOUISE F. GALLEHER
MOSBY GARLAND PERROW, JR.

Individually and Constituting
the State Board of Education

By: FREDERICK T. GRAY
Of Counsel

Frederick T. Gray
Attorney General of Virginia

R. D. McIlwaine, III
Assistant Attorney General

Supreme Court-State Library Building
Richmond 19, Virginia

Plaintiffs' Exhibit 24

(Resolution of the Board of Supervisors of Prince Edward County Dated 3 May 1956)

At a regular meeting of the Board of Supervisors of Prince Edward County held at the courthouse thereof on the 3rd day of May 1956, at which meeting all members of the board were present, the following resolutions were adopted unanimously:

I

BE IT RESOLVED BY THE BOARD OF SUPERVISORS, That we do hereby express to the people of Prince Edward County our gratitude that they have made known to this board so clearly their views upon the grave problems with which we are confronted with respect to our schools. The support of our people makes the burden of our responsibilities lighter and the course of our future action clearer. We trust the people of the county will continue to make known to us their views as we go forward to meet our problems together.

II

BE IT RESOLVED, That the Board of Supervisors of Prince Edward County as the elected representatives of the people of Prince Edward County, do hereby declare it to be the policy and intention of said board in accordance with the will of the people of said county that no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any plan or arrangement whatsoever.

Plaintiffs' Exhibit 24

III

BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the Governor of Virginia, the superintendent of public instruction, and the State Board of Education are hereby requested to pay any State revenue to the School Board of Prince Edward County in support of public schools in accordance with the policy adopted by the board of supervisors of said county for the payment of local revenues to said school board.

IV

BE IT FURTHER RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the "Affirmation" signed by citizens and school patrons of the county is hereby received and directed to be filed with records of the board and it is further resolved that the "Statement of Convictions and Purposes" adopted by the citizens of this county present at this meeting (being approximately 250 in number) be received by the board and it is directed that the same be filed with the records of the board.

And the clerk of this board is directed to prepare copies of the affirmation with a statement attached thereto showing the number of the citizens whose names are signed thereto together with copies of the "Statement of Convictions and Purposes" and that one copy of each be transmitted to the School Board of Prince Edward County, the Governor of Virginia, the superintendent of public instruction, the attorney general of Virginia, the State Board of Education, Representative J. H. Daniel and Senator J. D. Hagood, together with a copy of this resolution, and of the resolution this day adopted stating the policy and intention of this board with respect to the levy of taxes and appropriation of local revenue for school purposes.

V

BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the Governor be and he is hereby respectfully requested not to call a special session of the Legislature of Virginia for the purpose of presenting any legislative plan which would require, permit, or authorize under the laws of Virginia the teaching of white and Negro children together in the public schools of Prince Edward County.

HORACE ADAMS,
Clerk of the Board

Memorandum Opinion, Dated August 23, 1961

The issues raised, in this phase of the Prince Edward County school case, are:

Whether or not Prince Edward County can close and refuse to maintain its heretofore existing free public school system in order to avoid the racial discrimination prohibited by the Supreme Court of the United States, in Brown v. Board of Education, 347 U. S. 483; 349 U. S. 294; and

Whether or not the defendants, individually or in concert, have deliberately circumvented or attempted to circumvent or frustrate the order of this Court entered herein on the 22nd day of April, 1960.

In order to properly answer these questions it is necessary and appropriate to briefly review the history of this litigation.

This suit was originally instituted in 1951, and sought to enjoin the enforcement of the provisions of the Virginia Constitution and Code,[1] which required the segregation of

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[1] Virginia Constitution, Section 140, Code 22-221, 1950.

Negroes and whites in public schools. After years of litigation, the basic question raised therein was presented to the Supreme Court of the United States and was decided in a consolidated hearing, styled Brown v. Board of Education, 347 U. S. 483. The holding in that case was:

> "The Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property." Cooper v. Aaron, 358 U. S. 1.

Thus the provisions of the Virginia Constitution and Code referred to were declared unconstitutional and void.

That this decision was unpopular in most of the South, is understating the fact. Most of the southern states, including Virginia, adopted new laws in order to meet the situation thus created. Many of these new laws were declared unconstitutional, both by the federal and state courts.[1]

In compliance with the Brown decision, supra, this Court entered an order enjoining the defendants from discriminating against the plaintiffs in admission to the public schools of Prince Edward County solely on account of race, and further directed the defendants to proceed promptly with the formulation of a plan to comply therewith, commencing with the opening of the school year 1965.

The Court of Appeals for the Fourth Circuit, under date of May 5, 1959, reversed this Court and remanded the case with directions to issue an order in accordance with that opinion, which provided, among other things, that the defendants be enjoined from any action that regulates or

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[1] Harrison v. Day, 106 S. E. 2d 636; James v. Almond, 170 Fed. Supp. 331; Cooper v. Aaron, 358 U. S. 1; Beck v. Orleans Parish School Board, 191 Fed Supp. 875.

affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and to take immediate steps in this regard to the end that the applications be considered so as to permit the entrance of qualified persons into the white schools in the school term beginning September 1959. No decree was entered pursuant to the mandate of the Court of Appeals until the petitioners presented an appropriate order for entry therein on April 22, 1960, pertinent portions of said order being:

> "The defendants are restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.
>
> "That the defendants make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this and at the earliest practical day."

This Court and all counsel of record had knowledge of the fact that the public schools of Prince Edward County were closed prior to the entry of the said order.

The Board of Supervisors of Prince Edward County, anticipating the aforesaid decision of the Court of Appeals for the Fourth Circuit, refused to levy any taxes or appropriate any money for the maintenance of the public schools during the school year 1959-60, resulting in the closing thereof.

This action was in accord with the expressed policy of the Board of Supervisors (adopted in May 1956) to abandon public schools and educate the children in some other way if that be necessary to preserve separation of the races in the schools of Prince Edward County.[1]

All public schools in Prince Edward County have remained closed from that date to the present time and apparently will so remain until this or some state court directs that they be opened and maintained. Unfortunately, as a result thereof, all of the children of Prince Edward County, both white and colored, have been deprived of a public education since June 1959. In fact, none of the approximately 1800 colored children have received any formal education since that date. Nearly all of the 1500 white children have been attending private schools, operated by the Prince Edward School Foundation.

Under these circumstances should this Court enter an order directing the appropriate officials of Prince Edward County to reopen and maintain its public schools?

Section 129 of the Constitution of Virginia provides:

> "Free schools to be maintained.—The General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

The Supreme Court of Appeals of Virginia, in Harrison v. Day, 106 S. E. 2d 636, held that Section 129 of the Virginia Constitution is still in the organic law (of Virginia) and must be complied with. The Court further stated in its opinion:

> "that Section 129 requires the state to maintain an efficient system of public free schools throughout the State. That means that the State must support such public free schools in the State as are necessary

[1] See plaintiffs' Exhibit #2.

> to an efficient system, including those in which the pupils of both races are compelled to be enrolled and taught together, however unfortunate that situation may be."

Therefore it would appear from this decision that the Supreme Court of Appeals of Virginia has determined that public schools must be maintained in Prince Edward County, Virginia.

However, the defendants earnestly contend that the public schools in Virginia are not now and never have been operated by the state or by any state agency; that they are now and always have been owned, operated, managed and controlled by local (that is, county or city) school boards. The defendants further contend that other sections of the Virginia Constitution and certain statutes made pursuant thereto must be considered and construed in order to determine this question.

Counsel for the plaintiffs contend it is not necessary for this Court or the Supreme Court of Appeals of Virginia to further construe and/or pass upon the validity of any actions of the Virginia Constitution or statutes made pursuant thereto in order to properly decide this issue. They contend the closing of the public schools in Prince Edward County, while maintaining public schools in every other city and county in the state, violates the Fourteenth Amendment to the Federal Constitution, and cite James v. Almond, 170 Fed. Supp. 331, in support thereof:

> "While the State of Virginia, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise, in the management of such a school system, no one public school or grade in Virginia may be closed to avoid the effect of the law of the land as interpreted by the Supreme Court,

> while the state permits other public schools or grades to remain open at the expense of the taxpayers. In so holding we have considered only the Constitution of the United States as it is unnecessary, in our opinion, to pass upon the specific provisions of the Constitution of Virginia which deals directly with the free public school system of the state. We do not suggest that, aside from the Constitution of Virginia, the state must maintain a public school system. That is a matter for state determination. We merely point out that the closing of a public school, or grade therein, for the reasons heretofore assigned violates the right of a citizen to equal protection of the laws and, as to any child willing to attend a school with a member or members of the opposite race, such a school-closing is a deprivation of due process of law."

Whether the State of Virginia or the County of Prince Edward, technically speaking, owns and operates the public schools is of no concern of the children who are being deprived of free public education. The question that must and should be judicially determined is: Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?

Since the final answer to that question requires the interpretation of perhaps several sections of the Virginia Constitution and statutes adopted pursuant thereto, federal abstinence is the proper procedure.

> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced

working of our federal system. To minimize the possibility of such interference a scrupulous regard for the rightful independence of state governments should at all times actuate the federal courts, Matthews v. Rodgers, 284 U. S. 521, 525, as their contribution in furthering the harmonious relation between state and federal authority. Railroad Comm'r. v. Pullman Co., 312 U. S. 496." Harrison v. NAACP, 360 U. S. 167.

Counsel for all parties having indicated that an appropriate suit would be forthwith instituted in the Virginia state courts, this Court will defer its ruling on this question until the Supreme Court of Appeals of Virginia has rendered its decision, provided the said suit is filed within sixty days from this date.

Having thus disposed of the first question before the Court, and now turning to the second question, it is likewise necessary and proper to briefly review what has transpired in Prince Edward County subsequent to January 1, 1959. The record thus made is as follows:

The County Board of Supervisors of Prince Edward County, anticipating the May 5, 1959, decision of the Court of Appeals for the Fourth Circuit, failed or refused to make any funds available to the Prince Edward School Board for the fiscal and school years 1959-60, 1960-61 and 1961-62.

No public schools have been operated in the County since June 1959.

On May 16, 1959, certain private citizens obtained a charter for the Prince Edward School Foundation in order that private schools would be available for white children.

Such private schools were conducted during the school year 1959-60 for white children only; no tuition was charged; these schools were supported by private contributions.

Memorandum Opinion, Dated August 23, 1961

For the school year 1960-61, the Prince Edward School Foundation charged a tuition of $240.00 for its elementary students and $265.00 for its high school students.

On July 18, 1960, the Board of Supervisors of Prince Edward County adopted an ordinance providing for $100.00 grants in aid of the education of any Prince Edward County child whose parent or guardian applied therefor, who attended or proposed to attend a school that met the requirements of the ordinance.[1]

The Board of Supervisors adopted, on the same date, an ordinance providing for a tax credit, not to exceed 25% of the total county real and personal property taxes for contributions made to private non-profit nonsectarian schools located within Prince Edward County.[2]

During the school year 1960-61, thirteen hundred twenty-seven white students enrolled in the schools being operated by the Prince Edward School Foundation, obtained state and county tuition grants, totaling $225.00 for each elementary student and $250.00 for each high school student.

During the school year 1960-61, the Prince Edward School Foundation received private contributions in the amount of $200,000.00 which were credited to its building fund, its library fund and its operating fund.

The Treasurer of Prince Edward County credited as payments on account of county tax bills the sum of approximately $56,000.00, all of which was contributed to the Prince Edward School Foundation.

During both the 1959-60 and 1960-61 school years practically all of the white school teachers who formerly taught in the public school system in Prince Edward County were employed as teachers by the Prince Edward School Foundation.

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[1] See plaintiffs' Exhibit #15.

[2] See plaintiffs' Exhibit #16.

During the 1960-61 school year the Prince Edward School Foundation schools were accredited by the State Board of Education.

In 1960-61, the sum of $39,360.00 was received by Prince Edward County, from the State of Virginia as its share of the State Constitutional School Fund. These so-called constitutional funds were neither requested nor received by Prince Edward County during the school year 1959-60. This money was used by the School Board for the payment of debt service charges, repairs and upkeep of school buildings and grounds, fire insurance and other fixed charges and administration costs.

Five Negro children residing in Prince Edward County applied for and received state and county tuition grants for attending public schools elsewhere in Virginia.

The Prince Edward County Christian Association, a Negro association, conducted training centers for Negro children beginning in the late fall of 1959. These centers do not meet the requirements for either state or county tuition grants.

Approximately one-third of the Negro school children of Prince Edward County attended these training centers. The other Negro school children of Prince Edward County have not received any schooling or training of any kind since the closing of the public schools.

By the adoption of these County ordinances, and the payment of the state tuition grants during the time the schools of Prince Edward County were closed, have any of the defendants circumvented or attempted to circumvent or frustrate the anticipated order of this Court, entered pursuant to the mandate of the Court of Appeals?

We think they have.

> "The basic decision in Brown v. Board of Education was unanimously reached by the Supreme Court of the United States. Since the first Brown

opinion three new Justices have come to the court. They are at one with the Justices still on the court, who participated in that basic decision, as to its correctness and that decision is now unanimously reaffirmed." • • •

"The principles announced in that decision and the obedience of the state to them, according to the command of the Constitution are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us." Cooper v. Aaron, 358 U. S. 1.

"In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' (Smith v. Texas, 311 U. S. 128, 132.)" Cooper v. Aaron, 358 U. S. 1.

Without questioning the purpose or motives of the members of the Board of Supervisors of Prince Edward County, the end result of every action taken by that body was designed to preserve separation of the races in the schools of Prince Edward County.

"When a State[1] exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited

[1] Prince Edward County is likewise limited by this rule of law.

> a State from exploiting a power acknowledged to be absolute in an insulated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, viz., that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, (United States v. Reading Co., 226 U. S. 324, 357.)'' Gomillion v. Lightfoot, 364 U. S. 339.

Approximately $132,000.00 from general tax funds were paid to those residents of Prince Edward County who sent their children to schools maintained by the Prince Edward School Foundation, (a segregated white school). An additional $56,000.00 of tax revenue, in the form of tax credits, was used for this purpose. Like aid was not available to the colored residents of Prince Edward County, for the obvious reason there was no private colored school in existence. By closing the public schools, the Board of Supervisors have effectively deprived the citizens of Prince Edward County with a freedom of choice between public and private education. County tax funds have been appropriated (in the guise of tuition grants and tax credits) to aid segregated schooling in Prince Edward County.

That, to say the least, is circumventing a constitutionally protected right.

We do not hold these County ordinances[1] are facially unlawful. We only hold they become unlawful when used to accomplish an unlawful end, (the perpetuation of segregated schooling in Prince Edward County).

Therefore an order will be entered herein restraining and enjoining the members of the Board of Supervisors of Prince Edward County, the County Treasurer and their respective agents and employees from approving and paying out any county funds purportedly authorized by the

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[1] Educational grant in aid ordinance adopted July 18, 1960; Tax credit ordinance adopted July 18, 1960.

so-called "grant in aid" ordinance, adopted July 18, 1960, and from allowing any tax credits purportedly authorized by the so-called "tax credit" ordinance, adopted July 18, 1960, during such time the public schools of Prince Edward County remain closed.

We are next confronted with the question of the lawfulness of the payment of state tuition grants to residents of Prince Edward County during the time public schools are closed.

The policy of the Commonwealth of Virginia as enunciated in Section 22-115.29 of the Code of Virginia, is as follows:

> "The General Assembly, mindful of the need for a literate and informed citizenry, and being desirous of advancing the cause of education generally, hereby declares that it is the policy of this Commonwealth to encourage the education of all of the children of Virginia. In furtherance of this objective, and to afford each individual freedom in choosing public or private schooling, the General Assembly finds that it is desirable and in the public interest that scholarships should be provided from the public funds of the State for the education of the children in nonsectarian private schools in or outside, and in public schools located outside, the locality where the children reside; and that counties, cities and towns, if the town be a separate school district approved for operation, should be authorized to levy taxes and appropriate public funds to provide for such scholarships. (1960, c. 448.)"

Thus a "freedom of choice" between public and private schooling is clearly contemplated.

That the state did not intend its "scholarships" would be available in communities without public schools is best

evidenced by reference to the regulation of the State Board of Education governing public scholarships.[1] This rule reads as follows:

> "Scholarships will be available for pupils of legal school age who are eligible to attend the public schools in the county, city or town in which the parent, guardian or such other person standing in loco parentes is a bona fide resident."

This rule is plain and unequivocal. State scholarships are not available to persons residing in counties that have abandoned public schools.

An order will therefore be entered restraining and enjoining the County Superintendent of Prince Edward County, the Superintendent of Public Instruction, their agents and employees, and all persons working in concert with them, from receiving, processing or approving any applications for state scholarship grants from persons residing in Prince Edward County so long as the public schools of Prince Edward County remain closed.

The order of April 20, 1960, provides, among other things:

> "That the defendants (County Superintendent and School Board) make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this and at the earliest practical day."

That no such plans have been made is admitted. The defendants justify their failure to comply with the plain language of this order by stating they acted on advice of counsel and that it appeared useless to make such plans so long as the public schools of the County were closed.

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[1] See plaintiffs' Exhibit #20.

This Court cannot accept these reasons as justification for failing to comply with this portion of the order. Therefore the defendants are herewith directed to forthwith proceed with the preparation of such plans, so that they may be readily available when and if the public schools of Prince Edward County are reopened. The defendants should advise the Court in writing of the progress made on or before November 15, 1961.

There is no evidence the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property. The prayer for injunctive relief is therefore denied.

Counsel for the plaintiffs should prepare an appropriate order in accordance with this opinion, and submit the same to counsel for defendants for approval, and it will be entered accordingly, effective this date. Costs will be assessed against the defendants.

/s/ OREN R. LEWIS,
United States District Judge.

Alexandria, Virginia
August 23, 1961

Order, Filed November 16, 1961

This cause came on again to be heard upon the amended supplemental complaint, the motions to dismiss and answers of the defendants, upon the evidence and exhibits heard ore tenus by the Court, upon written briefs and argument of counsel, upon a consideration of all of which the Court rendered its memorandum opinion dated August 23, 1961, the original of which has heretofore been filed as a part of the record in this case; and

It appearing from statement of counsel and the copy of the suit papers that an appropriate suit has been timely instituted in the Supreme Court of Appeals of Virginia, seeking a determination of the legal question posed in this Court's opinion of August 23, 1961, namely: "Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the 14th Amendment?"

The Court reserves further consideration of this question until there has been a final determination by the Supreme Court of Appeals of Virginia of the pertinent provisions of the United States Constitution, the Virginia Constitution and statutes adopted pursuant thereto; and

The Court being of the opinion that action taken pursuant to certain ordinances of Prince Edward County would be a circumvention or attempted circumvention of the order of this Court entered April 22, 1960; it is

ORDERED that the Board of Supervisors of Prince Edward County, the County Treasurer of Prince Edward County and their respective agents and employees are hereby restrained and enjoined from approving and paying out any county funds purportedly authorized by the so-called "grant in aid" ordinance adopted July 18, 1960, and from allowing any tax credits purportedly authorized by the so-called "tax credit" ordinance adopted July 18, 1960, during such time as the public schools of Prince Edward County remain closed; said restraining order to remain in ef-

fect from August 23, 1961, until twenty days after the date of the final decision of the Supreme Court of Appeals of Virginia in the above mentioned suit, upon which date it shall stand dissolved except upon further order of this Court; and

The Court having found that scholarships awarded pursuant to Section 22-115.29 et seq. of the Code of Virginia (1950), as amended, are not available to persons residing in counties that have abandoned public schools; it is

ORDERED that the Division Superintendent of Schools of Prince Edward County, the Superintendent of Public Instruction, their agents, employees and all persons working in concert with them, are hereby restrained and enjoined from processing or approving any applications for State scholarship grants from persons residing in Prince Edward County so long as the public schools of Prince Edward County remain closed; said restraining order to remain in effect from August 23, 1961, until twenty days after the date of the final decision of the Supreme Court of Appeals of Virginia in the above mentioned suit, upon which date it shall stand dissolved except upon further order of this Court;

It is further ORDERED that the School Board of Prince Edward County forthwith comply with that portion of the order of this Court entered April 22, 1960, that provides, among other things, for making plans for the admission of pupils in the elementary schools of Prince Edward County without regard to race or color, and make written report to this Court on or before November 16, 1961, of the progress being made in the preparation of such plans; and

There being no evidence that the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property, the plaintiff's prayer for injunctive relief is denied.

Order, Filed November 16, 1961

The Court herewith reserves decision upon all other issues raised in the amended supplemental complaint and the motions and answers of the various defendants not specifically herein ruled upon until twenty days after the date of the final decision of the Supreme Court of Appeals of Virginia in the above mentioned suit; and

This cause is continued.

The Clerk shall forthwith serve an attested copy of this order, by certified or registered mail, upon the individual members of the School Board of Prince Edward County, the Division Superintendent of Schools of Prince Edward County, the Superintendent of Public Instruction, the individual members of the Board of Supervisors of Prince Edward County, the Treasurer of Prince Edward County, and all counsel of record in this suit.

s/ OREN R. LEWIS
United States District Judge

Richmond, Virginia
November 16, 1961

Order, Entered May 24, 1962

Defendant, School Board of Prince Edward County, Virginia, having moved in open court for an order pursuant to Rule 56 granting summary judgment in its favor upon Section V (paragraph 16) of the Amended Supplemental Complaint and dismissal of said section; and the Court in its memorandum opinion of August 23, 1961, and in its order of November 16, 1961, having found that there is no evidence that the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property and in said last mentioned order having denied the plaintiffs' prayer for injunctive relief in connection therewith; and the Court being of opinion that there is no just reason for delay in finally disposing of the claim raised by Section V of the Amended Supplemental Complaint and that pursuant to Rule 54(b) it should now expressly direct entry of judgment in favor of this defendant, School Board of Prince Edward County, upon said claim;

IT IS ORDERED

That defendant's motion for a summary judgment as to the cause of action alleged in Section V of the Amended Supplemental Complaint is hereby granted and said Section V is hereby dismissed and the Clerk of this Court is directed to enter a final judgment in favor of said School Board on the cause of action alleged in said Section V of the Amended Supplemental Complaint, and the undersigned District Judge expressly determines that there is no just reason for delay in the entry of final judgment on this order.

s/ OREN R. LEWIS
United States District Judge

May 24, 1962

Memorandum Opinion, Dated July 25, 1962

The infant plaintiffs in the Prince Edward school case are again before this Court seeking admission to the public schools of Prince Edward County, Virginia, on a non-discriminatory basis—all in accord with the *Brown*[1] decisions.

Rather than comply with those decisions and the order of this Court, the defendant Board of Supervisors caused the closing of all public schools in the county.

Thereafter the petitioners filed an amended supplemental complaint raising the following issues:

(1) Whether the public schools heretofore maintained in Prince Edward County can be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment of the United States Constitution.

(2) Whether the defendants, individually or in concert, have deliberately circumvented, or attempted to circumvent or frustrate, the order of this Court entered herein on the 22nd day of April, 1960.

Issue numbered (2) was partially determined August 23, 1961, and it is not necessary to repeat those rulings in this opinion (see memorandum opinion dated August 23, 1961, and order dated November 1, 1961).

This Court has repeatedly stated that the Prince Edward school case would not be terminated until this or some other court determined issue numbered (1), above recited.

Upon the assurance of counsel for petitioners that such a suit would be filed in the state courts, and upon the further assurance of counsel for the Board of Supervisors

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[1] *Brown* v. *Board of Education*, 347 U. S. 483 (1954); 349 U. S. 294 (1955).

of Prince Edward County that he would file such a suit[2] if the petitioners failed to so do, this Court abstained from determining the issue, pending a final ruling by the Supreme Court of Appeals of Virginia.

But such was not to be—true the petitioners filed a petition for writ of mandamus in the Supreme Court of Appeals[3] to compel the Board of Supervisors of Prince Edward to appropriate money for the maintenance and operation of free public schools in the county. However, they expressly informed that court in their printed brief that "There are no Federal questions (involved) in this proceeding," and Chief Justice Eggleston, speaking for the Supreme Court of Appeals, said " • • • and we perceive none."

The defendants now move this Court to dismiss or, in the alternative, to abstain from determining the issues presented in the amended supplemental bill of complaint upon the ground the petitioners deliberately failed and refused to comply with the order[4] of this Court by deleting all federal questions from the suit filed in the Supreme Court of Appeals.

This motion would be meritorious had the defendants filed an appropriate answer and/or countersuit to the plaintiffs' petition for writ of mandamus so that the citizens of Virginia would have learned from their highest state court whether the public schools of Prince Edward County could be legally closed in accordance with the State and Federal Constitutions, under the circumstances and conditions there existing.

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[2] This assurance was made after conferring with the Attorney General of Virginia and counsel for the School Board of Prince Edward County.

[3] *Leslie Francis Griffin, Jr.* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S. E. 2d 227 (1962).

[4] Order of November 1, 1961.

This "issue" must be determined—and dismissal of the pending suit will not accomplish that end. Therefore, the motion of the defendants to dismiss the amended supplemental complaint will be denied.

The doctrine of abstention is well embedded in the federal procedure, and rightfully so. It is aimed at the avoidance of unnecessary interference by the federal courts with properly administered state concern. See *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167 (1959). However, the District Court cannot avoid its duty to adjudicate a controversy properly before it by postponing the exercise of its jurisdiction by invoking the doctrine of abstention. See *County of Allegheny* v. *Frank Mashuda Company*, 360 U. S. 185 (1959). And especially so when it is advised by counsel for all parties that none of them intends to file another suit in the state courts.[5]

The Prince Edward County public schools have been closed for three years and will remain closed unless they be legally required to reopen. During the interim practically all of the negro children in the county have been denied a formal education. The white children are being educated in the (private) Prince Edward Foundation schools, or away from home, at the expense of their parents and friends. All other children in the State of Virginia, both negro and white, are given the privilege of being educated in public schools at public expense.

This is a suit in equity instituted by the infant plaintiffs requesting this Court to declare and insure them, and all others similarly situated, their constitutional rights.

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[5] Counsel for petitioners contend state constitutional questions are not involved—they seek only federal relief. The Attorney General and counsel for the Board of Supervisors and the School Board of Prince Edward admit both State and Federal constitutional questions are involved but contend they have neither the authority not the duty to file an appropriate suit in the state courts.

To further abstain is to further delay—and further delay in the formal education of 1,700 children would create an irreparable loss. These children are entitled to know whether any of their federally protected rights are being abridged. The motion to further abstain will be denied.

That the Board of Supervisors of Prince Edward caused the closing of the public schools in the county in order to avoid the racial discrimination prohibited by the Supreme Court of the United States[6] cannot be seriously questioned. This action was in accord with the Board's expressed policy (adopted in May, 1956) to abandon public schools and educate the children some other way if that be necessary to preserve segregation of the races in the schools of Prince Edward County.[7]

The defendants attempt to justify their action and/or inaction upon the theory that public schools of Prince Edward County are owned, operated, managed and controlled by the local school board—that they are not now and never have been operated by the state or any state agency—that the Fourteenth Amendment is addressed solely to the state—that the Board of Supervisors cannot be compelled to levy taxes or appropriate money for the maintenance of free public schools—and that the reason or motive back of such action or inaction is beyond judicial review.

In determining whether these contentions are well-founded, it is necessary and proper to review and re-examine the Federal and State Constitutions, the implementing statutes, and the recent court decisions pertaining to public education. In so doing, we find the Supreme Court of Appeals of Virginia in the *Griffin* suit, *supra*, held that Section 136 of the Constitution of Virginia and Code Sections 22-126 and 22-127, as amended, which implement the con-

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[6] *Brown* v. *Board of Education*, *supra*.

[7] See Petitioners' Exhibit No. 2.

stitutional provision, vest in the Board of Supervisors of Prince Edward County the discretionary power and authority to determine what additional sums, if any, should be raised by local taxation to supplement the funds provided by the state for the support of the schools in the county. That holding was in accord with previous decisions of that court. See *School Board of Carroll County* v. *Shockley*, 160 Va. 405, 168 S. E. 419 (1933). See also *Almond* v. *Gilmer*, 188 Va. 1, 49 S. E. 2d 431 (1948); *Scott County School Board* v. *Board of Supervisors*, 169 Va. 213, 193 S. E. 52 (1937); *Board of Supervisors of Chesterfield County* v. *County School Board*, 182 Va. 266, 28 S. E. 2d 698 (1944).

There is not anything in the *Griffin* decision indicating that the Board of Supervisors has a duty to maintain or operate public schools. To the contrary, Chief Justice Eggleston, speaking for the court, said:

> "Whatever may be the duty imposed under Section 129 of the Constitution, that section is plainly directed to the General Assembly and not to the local governing bodies. It says, 'The General Assembly shall establish and maintain an efficient system of public free schools throughout the State' * * * *"

In *Harrison* v. *Day*, 200 Va. 439, 106 S. E. 2d 636 (1959), the Supreme Court of Appeals held that Section 129 of the Virginia Constitution is still in the organic law (of Virginia) and must be complied with. The court further stated in its opinion that Section 129

> "* * * requires the State to '*maintain* an efficient system of public free schools *throughout the State*.' (Emphasis included.) That means that the State must support such public free schools in the State as are necessary to an efficient system, including those in which the pupils of both races are compelled to

be enrolled and taught together, however unfortunate that situation may be."

The court further stated that the provisions of certain appropriation acts (then under consideration by that court) violated Section 129 of the Constitution in that they removed from the public school system any schools in which pupils of the two races are mixed and made no provision for the support and maintenance of said schools as a part of the system.

From this decision is would appear that the Constitution of Virginia imposes a mandatory duty to establish and maintain an efficient system of public schools throughout the state, and that the state may not remove from the system schools in which the races are mixed.

Article IX of the Constitution of Virginia, embracing the subjects of Education and Public Instruction, contemplates that moneys for the establishment and maintenance of public free schools will be appropriated partly by the General Assembly and partly by the local governing units. (See *Griffin* v. *Board of Supervisors of Prince Edward County, supra.*) Other sections of that article provide for the appointment and duties of the Superintendent of Public Instruction, the powers and duties of the State Board of Education, and the creation of school districts and school trustees. Title 22 (Education) of the Code of Virginia, implements these constitutional provisions.

From a careful reading of the foregoing Virginia authorities, it would appear the local school boards have been given the responsibility by law of establishing, maintaining, and operating the school system along with the State Board of Education, Superintendent of Public Instruction and Division Superintendent of Schools. The Supreme Court of Appeals has so held.[8]

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[8] See *Board of Supervisors of Chesterfield County, et al.* v. *County School Board of Chesterfield County, supra.*

Thus it is clear the public schools of Prince Edward County are not under the sole control of the county.

This Court finds, and so holds, that the public schools of Virginia were established, and are being maintained, supported and administered in accordance with state law. These public schools are primarily administered on a statewide basis. A large percentage of the school operating funds is received from the state. The curriculums, school text books, minimum teachers' salaries, and many other school procedures are governed by state law.

Nevertheless the public schools of Prince Edward County have been closed for the past three years. This was accomplished by the refusal of the Board of Supervisors to levy taxes or appropriate money for the maintenance of public schools, all of which was in accord with the expressed policy of the Board of Supervisors in their attempt to avoid the requirements of the *Brown* decision. This action was taken with full knowledge and acquiescence of the State Board of Education, the Superintendent of Public Instruction, the School Board of Prince Edward County, and the Division Superintendent.

In these circumstances true focus is not on the Board of Supervisors but on the above-named school officials, all of whom directly or indirectly are state officials. They cannot abdicate their responsibilities either by ignoring them or by merely failing to discharge them, whatever the motive may be. See *Burton* v. *Wilmington Pkg. Authority*, 365 U. S. 715 (1961).

As the court said in *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861 (1960),

> "* * * equality of opportunity to education through access to non-segregated public schools is a right secured by the Constitution of the United States to all citizens regardless of race or color

against State interference. *Brown* v. *Board of Education*, 347 U. S. 483. * * * accordingly, every citizen of the United States, by virtue of his citizenship, is bound to respect this constitutional right, and * * * all officers of the state, more especially those who have taken an oath to uphold the Constitution of the United States, including the governor, the members of the state legislature, judges of the state courts, and members of the local school boards, are under constitutional mandate to take affirmative action to accord the benefit of this right to all those within their jurisdiction. U. S. Const. art. VI, cls. 2, 3; *Cooper* v. *Aaron*, 358 U. S. 1."

And as the court said in *Cooper* v. *Aaron* 358 U. S. 1 (1958),

"'Whoever, by virtue of public position under a State government, * * * denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' *Ex parte Virginia*, 100 U. S. 339, 347. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia* v. *Rives*, 100 U. S. 313; *Pennsylvania* v. *Board of Directors of City Trusts of Philadelphia*, 353 U. S. 230; *Shelley* v. *Kraemer*, 334 U. S. 1; or whatever the guise in which it is taken, see *Derrington* v. *Plummer*, 240 F. 2d 922; *Department of Conservation and Development* v. *Tate*, 231 F. 2d 615."

Note also the following apt statement from *Cooper* v. *Aaron:*

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." See also *James* v. *Almond, supra.*

Counsel for the Board of Supervisors has seriously contended, however, that what the Board of Supervisors does, or does not do, is not state action; that the Board of Supervisors cannot be compelled to levy taxes or appropriate money for school purposes. The Supreme Court of Appeals in the recent *Griffin* case so held in re levying taxes and appropriating money for school purposes. That court did not, however, pass upon or consider any federal questions.

Counsel for the Prince Edward School Board and the Division Superintendent wholeheartedly supported the contention of the Board of Supervisors. No argument was tendered justifying the failure of those school officials in fulfilling or attempting to fulfill the responsibility imposed by law of establishing, maintaining, and operating a free

public school system, except to state that the County School Board will establish and maintain public schools in Prince Edward County if funds are made available to it, all in strict accordance with the April 22, 1960 order of this Court.

The Attorney General of Virginia, counsel for the State Board of Education and Superintendent of Public Instruction, likewise, in the main, supported the position of the Board of Supervisors. No argument was presented justifying the failure of those state officials from attempting to fulfill the responsibilities reposed in them by the Constitution of Virginia of establishing a system of free public schools throughout the state, and as set forth in *Board of Supervisors of Chesterfield County* v. *County School Board of Chesterfield County, supra.*

The contention that the action and inaction of the foregoing state and county officials resulting in the closing of the Prince Edward County schools was a local action, beyond the purview of the Fourteenth Amendment, is not well taken. County has been defined[9] "as a body politic, or political subdivision of the State, created by the legislature for administrative and other public purposes." It is generally regarded as merely an agency or arm of the state government.

The United States Constitution recognizes no governing units except the federal government and the states. A contrary position would allow a state to evade its constitutional responsibilities by carve-outs of small units. At least in the area of constitutional rights, specifically with respect to education, a state can no more delegate to its subdivisions the power to discriminate than it can itself directly establish inequalities. "When a parish wants to lock its school doors, the state must turn the key. If the

[9] Corpus Juris Secundum, V. 20, p. 1300.

rule were otherwise, the great guarantee of the equal protection clause would be meaningless."[10]

James v. *Almond*, 170 F. Supp. 331 (1959), in discussing the validity of the closing of some of the City of Norfolk schools, also announces this same view. It said:

> "While the State of Virginia, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise in the management of such a school system, no one public school or grade in Virginia may be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the state permits other public schools or grades to remain open at the expense of the taxpayers."

The Court further said:

> "We do not suggest that, aside from the Constitution of Virginia, the state must maintain a public school system. That is a matter for state determination."

This Court holds that the public schools of the Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers.

In the event the public schools of Prince Edward County are reopened and maintained in accordance with the order of this Court entered herein on the 22nd day of April, 1960, it will not be necessary to enter a more formal order. If, however, the said schools are not reopened prior to Sep-

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[10] *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (1961).

tember 7, 1962, this Court will on that day consider any and all proposed orders tendered by counsel of record.

> "* * * When, notwithstanding their oath so to do, the officers of the state fail to obey the Constitution's command, it is the duty of the courts of the United States to secure the enjoyment of this right to all who are deprived of it by action of the state. *Brown* v. *Board of Education*, 349 U. S. 294." *Bush* v. *Orleans Parish School Board, supra.*

The School Board of Prince Edward County is herewith directed to complete plans for the admission of pupils in the elementary and high schools of the county without regard to race or color and to receive and consider applications to this end at the earliest practical date. The proposed plans should be submitted to all counsel of record not later than September 1, 1962, if possible, and to this Court on September 7, 1962.

The motion to substitute successor defendants is herewith granted.

The motion to dismiss the motion for further relief is herewith granted.

The motion to dismiss the injunction entered herein on November 16, 1961, and further extended March 26, 1962, is denied. The said injunction is effective only so long as the public schools of Prince Edward County remain closed.

Let copies of this memorandum be mailed forthwith to all counsel of record.

/s/ OREN R. LEWIS,
United States District Judge.

Alexandria, Virginia
July 25, 1962

Memorandum Opinion, Filed October 10, 1962

Counsel for the defendants having expressed their desire to be heard prior to the entry of the Court's suggested order (mailed to all counsel of record September 20), the Court again heard the matter informally in Chambers on the 3rd day of October, 1962, at which time counsel for the defendants moved the Court to amend its finding as set forth in its Memorandum Opinion of July 25, 1962, and to rehear and reconsider in part that opinion, and to abstain upon the grounds set forth in said motion.

Upon consideration of which, together with the argument of counsel, the Court is of the opinion that said motion ought to be DENIED in its entirety, and it is so ORDERED.

Whereupon counsel for the defendants then orally moved the Court to amend some of the findings set forth in the Memorandum Opinion of July 25, 1962, upon consideration of which the Court herewith amends paragraph 2, page 3, of said Memorandum Opinion by inserting the word "reply" after the word "printed" (line 7), and amends paragraph 2, page 11, by deleting "and acquiescence" (line 9) therefrom. All other requested amendments or deletions are herewith DENIED.

Whereupon counsel for the defendants then made certain suggestions in re the proposed order as prepared by the Court to be entered herein, some of which were adopted and some of which were refused, and the proposed order, as prepared by the Court in accord with its Memorandum Opinion of July 25, was this day entered herein.

s/ OREN R. LEWIS
United States District Judge

Alexandria, Virginia
October 10, 1962

Order, Filed October 10, 1962

Upon consideration of the evidence, exhibits and authorities cited in support of the contentions of the respective parties, and argument in re all motions pending in the above-styled matter, the Court rendered its Memorandum Opinion dated July 25, 1962, wherein, it was provided among other things:

> "In the event the public schools of Prince Edward County are reopened and maintained in accordance with the order of this Court entered herein on the 22nd day of April, 1960, it will not be necessary to enter a more formal order. If, however, the said schools are not reopened prior to September 7, 1962, this Court will on that day consider any and all proposed orders tendered by counsel of record."

Upon which date, counsel for the defendants moved the Court to stay further proceedings herein until 20 days after date of final disposition in the Supreme Court of Appeals of Virginia of the suit which was instituted in the Circuit Court of the City of Richmond on August 31, 1962, by the School Board of Prince Edward County, et al v. Leslie Francis Griffin Sr., et al, to determine among other things whether the public schools heretofore maintained in Prince Edward County can be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment;

To which motion counsel for the plaintiffs objected; and

It appearing to the Court that further abstention would create an irreparable loss in the formal education of the children of Prince Edward County,

The motion of the defendants to stay further proceedings in this suit is DENIED.

Pursuant to the order of July 25, 1962, and previous orders of this Court that the School Board of Prince Ed-

ward County complete plans for the admission of pupils in the elementary and high schools of the county without regard to race or color and to receive and consider applications to this end at the earliest practical date, the said School Board filed a report stating that it no longer is possessed of the power to enroll or place pupils or to determine the school to which any children shall be admitted; that such power is vested in the Pupil Placement Board; and accordingly, the plan proposed for the admission of pupils (to Prince Edward County public schools) is that set forth in the Pupil Placement Law and the rules and regulations of the Board.

The report thus received does not comply with the orders of this Court.

The authority having the immediate supervision of the schools, that is, the agency actually receiving or rejecting the pupils, is the County School Board. The Placement Act, however, is still alive as between the School Board and the Placement Board. It divests the former of and invests the latter with all assignment powers; hence, the School Board must submit these applications to the Placement Board and in the first instance bow to the latter's assignment prerogative, but in any order of revision on a review will bear directly upon the School Board as the body ultimately responsible and immediately answerable to the Court for the physical enrollment and admissions of all pupils.

Accordingly, if the School Board of Prince Edward County intends to rely upon the validity of the Pupil Placement Board assignment plan, such plan, set forth in reasonable detail, should be forthwith submitted to this Court for review and approval, and it is so Ordered.

It appearing to the Court that the public schools of Prince Edward County were not reopened prior to September 7, 1962, in accordance with the Court's Memorandum Opinion of July 25, 1962, and that counsel of record could

not agree on the wording of an appropriate order to be entered in accordance therewith;

The Court's Memorandum Opinion of July 25, 1962, is incorporated herein and made a part of this order by reference; and

The Court having found:

that the Board of Supervisors of Prince Edward County caused the closing of the public schools in the county in order to avoid the racial discrimination prohibited by the Supreme Court of the United States; and

that said schools have been closed for three years and will remain closed unless they be legally required to reopen; and

that during the interim practically all of the negro children have been denied a formal education; and that the white children have been educated in private schools or away from home at the expense of their parents and friends; and

that all other children in the State of Virginia, both negro and white, are granted the privilege of being educated in public schools at public expense; and

that Section 129 of the Constitution of Virginia, as construed by the Supreme Court of Appeals of Virginia, requires the State to maintain an efficient system of public free schools throughout the State; and

that Article 9 of the Constitution of Virginia contemplates that money for the establishment and maintenance of public free schools will be appropriated partly by the General Assembly and partly by the local governing units; and

that the State Board of Education, Superintendent of Public Instruction and Division Superintendent of Schools, and the local school boards, have been given the responsibility by law of establishing, maintaining and operating the school system; and

that the public schools of Virginia were established and are being maintained, supported and administered in accordance with State law—primarily on a state-wide basis; and

that a large percentage of the school operating funds is received from the State; and

that textbooks, curriculums, minimum teachers' salaries and many other school procedures are governed by State law; and

that the aforementioned school officials, all of whom are directly or indirectly State officials, cannot abdicate their responsibilities merely by ignoring them or by failing to discharge them, whatever the motive may be;

And the Court having concluded that the closing of the public schools in Prince Edward County, under the circumstances and conditions there existing, is prohibited by the Fourteenth Amendment of the Constitution of the United States; it is

ADJUDGED, ORDERED AND DECREED that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers; and it is further

Order, Filed October 10, 1962

ORDERED AND DECREED as follows:

(1) That the defendants' motion to dismiss, or in the alternative to abstain from determining the issues presented in the amended supplemental complaint, is Denied.

(2) That the defendants' motion to dismiss the plaintiffs' motion for further relief is Granted.

(3) That the plaintiffs' motion to substitute successor defendants is Granted, and Anne Dobie Peebles and C. Stuart Wheatley, Jr., individually and as members of the State Board of Education, are substituted for Gladys V. V. Morton and William J. Story as parties defendant herein.

(4) That the defendants' motion to dissolve the injunction entered herein on November 16, 1961 and further extended on March 26, 1962, is Denied. Said injunction is herewith extended so long as the public schools of Prince Edward County remain closed.

This Court will defer the entry of such further orders as may be necessary and proper to require full compliance with this decree pending review by the United States Court of Appeals for the Fourth Circuit and the Supreme Court of the United States, providing such appeal is noted and perfected within the time provided by law.

s/ OREN R. LEWIS,
United States District Judge.

Alexandria, Virginia
October 10, 1962

Notice of Appeal

Notice is hereby given that Cocheyse J. Griffin, Mignon D. Griffin, Naja D. Griffin and L. Francis Griffin, Jr., infants, by and through L. Francis Griffin, Sr., their father and next friend, Osa Sue Allen and Ada D. Allen, infants, by and through Hal Edward Allen, their father and next friend, Toby Hicks, Carl Hicks, Gregory Hicks, Boyce U. Z. Hicks and John Hicks, infants, by and through C. W. Hicks, their father and next friend, Betty Jean Carter, an infant, by and through James L. Carter, her father and next friend, Dorothy Mae Wood, an infant, by and through Spencer Wood, Jr., her father and next friend, Jacquelyn Reid, an infant, by and through Warren A. Reid, her father and next friend, and L. Francis Griffin, Sr., Hal Edward Allen, C. W. Hicks, James L. Carter, Spencer Wood, Jr., and Warren A. Reid

Hereby appeal to the United States Court of Appeals for the Fourth Circuit from so much of the order of this Court entered in the above captioned cause on October 10, 1962, as defers, pending review, the entry of an order directing compliance with the Court's holding that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers; the effect of such deferment being a refusal of the prayer of the amended supplemental complaint that the defendants be enjoined and restrained from refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia, and a refusal of the prayer for general relief.

The said appellants have heretofore given notice, and they hereby again give notice, of their appeal to the United States Court of Appeals for the Fourth Circuit from the

order of this Court entered in the above captioned action on November 16, 1961, and from so much of said order as limits the effective period of its restraining or injunctive provisions to so long as the public schools of Prince Edward County remain closed, the effect of said order and of its said limitation being a refusal of the prayers of the plaintiffs' amended supplemental complaint that the defendants be enjoined and restrained:

(b) From expending public funds for the direct or indirect support of any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated.

(c) From expending public funds in aid of, or in reimbursement of money paid for, the attendance of any child at any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated, and

(d) From crediting any taxpayer with any amount paid or contributed to any private school, which for reason of race, excludes the infant plaintiffs and others similarly situated.

The said appellants have heretofore given notice, and they hereby again give notice, of their appeal to the United States Court of Appeals for the Fourth Circuit from the order of this Court entered in the above captioned action May 24, 1962, by which the motion of the defendant County School Board of Prince Edward County, Virginia, for a summary judgment as to the cause of action alleged in Section V of the Amended Supplemental Complaint was granted and said Section V was dismissed and the Clerk

was directed to enter a final judgment in favor of said defendant school board.

S. W. TUCKER,
Of Counsel for Appellants.

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Counsel for Appellants.

[fol. 91]

APPENDIX

To Reply Brief of the Board of Supervisors of Prince Edward County, Appellees, and Brief of the Board of Supervisors of Prince Edward County, Cross Appellants.

[fol. 93]

MOTION OF THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY TO DISMISS AMENDED SUPPLEMENTAL COMPLAINT

The Board of Supervisors of Prince Edward County, Virginia, having been made a party defendant to this action by amended supplemental complaint, by order entered on the 24th day of April, 1961, moves the court as follows:

I.

To dismiss the amended supplemental complaint upon the ground that it states a new cause of action in that the original cause of action alleged racial discrimination in the admission, enrollment and education of Negro children in the public schools of the County and sought an injunction against such alleged discriminatory practices, whereas the amended supplemental complaint sets forth an alleged duty under the Constitution and laws of the State of Virginia, requiring the Board of Supervisors of Prince Edward County to levy taxes and to appropriate money for the operation of public schools and seeks affirmatively to compel said Board of Supervisors to levy taxes and appropriate money for such purposes, the prayer of the said amended supplemental complaint and this defendant being entirely foreign to the purposes and prayers of the original complaint and to the order of April 22, 1960, entered thereon.

[fol. 94]

II.

To dismiss the amended supplemental complaint upon the ground that it appears upon the face of the amended supplemental complaint when read with the original complaint and the order of April 22, 1960, entered thereon that

neither the original complaint nor the order of April 22, 1968, has any reference whatever to any alleged legal obligation requiring the operation of public schools in Prince Edward County, nor to any alleged legal obligation resting upon the Board of Supervisors of Prince Edward County to operate public schools within the said County or to the levy of taxes of appropriation of money by the said Board of Supervisors for said purpose. Consequently, the alleged actions of the Board of Supervisors of said County, as a matter of law, do not violate the terms of the said order nor do they violate any purported rights of the plaintiffs under or by virtue of said order.

III.

To dismiss the allegations contained in Paragraph 16 of the amended supplemental complaint as to this defendant upon the ground that the Board of Supervisors of Prince Edward County has no power, control or responsibility with respect to the conveyance, lease or transfer of public schools or public school property in Prince Edward County.

IV.

To dismiss the amended supplemental complaint as to it for lack of jurisdiction upon the ground that it appears the power upon the face of the amended supplemental complaint [fol. 95] that the Board of Supervisors of Prince Edward County acted in the exercise of valid and constitutional powers reposed in it under the Constitution and laws of the State of Virginia in its refusal to levy taxes and appropriate money for the operation of public schools within the County, and that the order sought against the said Board of Supervisors of Prince Edward County constitutes this a suit against the Commonwealth of Virginia of which this court does not have jurisdiction by virtue of the prohibition of the Eleventh Amendment of the Constitution of the United States.

V.

To dismiss the amended supplemental complaint as to it for lack of jurisdiction upon the ground that the power

of taxation and the appropriation of public funds is a legislative power which cannot be exercised other than under legislative authority and in strict compliance with the legislative requirements for its exercise, and the prayer of the amended supplemental complaint, in effect, asks a federal court to exercise an exclusively legislative power by compelling a local legislative body to levy taxes and to appropriate money, which is beyond the limits of the judicial power conferred upon this court under the Constitution of the United States, and which raises a political question with which federal courts have consistently refused to interfere.

VI.

To dismiss the amended supplemental complaint upon the ground that it raises questions which require a construction of provisions of the Constitution of Virginia [fol. 96] and statutes enacted by the legislature of the Commonwealth of Virginia in pursuance thereof relating to matters of the most delicate nature involving federal-state relations; that a final authoritative determination of these issues cannot be accomplished in this court but must be accomplished in the Supreme Court of Appeals of Virginia, which has the final authority for construction of the provisions of the Constitution of Virginia and the statute here involved; that the doctrine of equitable abstention should be followed in this case and that the amended supplemental complaint should be dismissed and the complainants permitted to seek a construction of the said constitutional provisions and statutes in the State courts as they may be advised, there being available speedy and adequate procedures, and by following such course any possible federal questions which may be considered to have been raised by the amended supplemental complaint may never be raised.

VII.

The Board of Supervisors of Prince Edward County moves the court to dismiss the amended supplemental complaint because it fails to state a case upon which relief may

be granted; because it fails to state or allege facts giving rise to a federal question; because it seeks to convert the Fourteenth Amendment and the order of April 22, 1960, into an affirmative mandate extending not only to the original defendant, the School Board of Prince Edward County, but affirmatively extending to this defendant and the other new defendants added thereby; because it seeks to extend the federal judicial power into the area of state legislative discretion by prayer for a mandamus in the form of a negative injunctive decree and thereby seeks to restrict individual freedom guaranteed by the Constitu- [fol. 97] tion of the United States; because it seeks to extend federal judicial power to unconstitutional control of state administration of education and seeks to extend the said federal judicial power into the impractical supervision of the details of school administration.

All of which appears upon the face of the amended supplemental complaint as follows:

(1) The levy of taxes by the Board of Supervisors of Prince Edward County is clearly within the discretion vested in said Board by Section 136 of the Constitution of Virginia and by Section 22-127 of the Code of Virginia and the amended supplemental complaint does not allege that any provision of the Constitution of Virginia or of the state law vesting said power in the Board of Supervisors of Prince Edward County is repugnant to the Constitution of the United States or that the same has been exercised by the said Board of Supervisors in a manner repugnant to the Constitution of the United States.

Prayer (a) of the amended supplemental complaint is in effect a prayer for a mandamus by the federal judiciary to a state legislative body to compel the levy of taxes and the appropriation of money for public schools, which, as a matter of law, is not a matter within the jurisdiction of a federal court and as a matter of law does not violate the Fourteenth Amendment or the order of April 22, 1960, entered in this cause.

(2) Prayer (b) of the amended supplemental complaint does not ask the court to declare any law of the Com-

monwealth of Virginia or any ordinance of the Board of Supervisors repugnant to the Constitution of the United States, but on the contrary is a prayer that the federal [fol. 98] judiciary, by use of its injunctive power, exercise an affirmative, purely legislative function and, in effect, is a prayer for the judiciary to amend all ordinances of the County and laws of the Commonwealth of Virginia by which any money may be paid directly or indirectly to any private school so as to provide that by the payment or acceptance of such money a private school receiving the same forfeits its freedom to accept or reject students as it may choose.

The judicial action prayed for would (1) constitute a violation of the negative nature and terms of the Fourteenth Amendment, (2) would constitute an unconstitutional invasion by the federal judicial branch of legislative discretion vested in the legislative branch of state government in violation of the most fundamental principle of the United States Constitution and of a Republican form of government, (3) would constitute an extension of the prohibitions of the Fourteenth Amendment into the area of individual and private action and choice in violation of the express limitations of the Fourteenth Amendment and in violation of freedoms guaranteed by other provisions of the United States Constitution to private individuals.

(3) Prayer (c) of the amended supplemental complaint, does not ask the court to declare any law of the Commonwealth of Virginia or any ordinance of the Board of Supervisors repugnant to the Constitution of the United States, but is a prayer that the judiciary, by the use of its injunctive power, exercise an affirmative legislative function and, in effect, amend all ordinances and all laws of the Commonwealth of Virginia by which money may be paid to parents or individuals in aid of the education [fol. 99] of children or individuals so as to restrict the freedom of such parent or individual to seek education in such environment and association as such parent or individual may select.

The judicial action prayed for is (1) in violation of the negative terms and nature of the Fourteenth Amend-

ment, (2) an unconstitutional invasion by the federal judiciary of the area of legislative discretion, and is, in short, a mandamus to the legislative branch, (3) is an extension of the prohibitions of the Fourteenth Amendment into the area of private, parental and individual action in violation of the express limitations of the Fourteenth Amendment to state action, and (4) is a violation of freedoms secured to such parents and persons under other provisions of the United States Constitution.

(4) Prayer, (d) of the amended supplemental complaint does not ask the court to declare the ordinance under which the tax credit referred to is granted or the state statute upon which the same is based to be repugnant to the Constitution of the United States, but is a prayer that the federal judiciary, by the exercise of its injunctive power, exercise an affirmative and purely legislative function and, in effect, is a prayer that the court amend the County ordinance and the state law upon which it is based so as to provide that the tax credits authorized therein be given only for contributions made to such private schools as do not exclude applicants upon the basis of race.

The judicial action prayed for is (1) in violation of the negative nature and terms of the Fourteenth Amendment, (2) is an unconstitutional invasion by the judicial branch of legislative discretion reposed in a legislative branch [fol. 100] of the state government, and is in short a prayer for a mandamus to such legislative branch, (3) is an extension of the Fourteenth Amendment into the area of private individual action in violation of the express limitations of the Fourteenth Amendment to state action, and (4) is an unconstitutional restriction of and violation of freedoms secured to individual tax payers by other provisions of the United States Constitution.

(5) Prayer (e) of the amended supplemental complaint is not based upon any allegation that such leasing, conveyance or transfer of school property constitutes a violation of any provision of the United States Constitution or of the order of April 22, 1960, or of any other provision of federal law.

The judicial action prayed for is (1) in violation of the negative nature and terms of the Fourteenth Amendment, (2) would constitute an invasion by the federal judicial branch of administrative discretion lawfully vested in the School Board of Prince Edward County under the Constitution and laws of the Commonwealth of Virginia, and (3) would require a supervision of the details of administrative judgment beyond the practical reach of the process of a court of equity.

(6) The amended supplemental complaint Paragraph I (2) alleges that the state law requires the maintenance of a system of free public schools and that the failure to maintain such schools in Prince Edward County while a system of public schools are maintained in other counties and cities of the Commonwealth constitutes a violation of the due process and equal protection clauses of the Fourteenth Amendment. Such allegation does not support [fol. 101] prayer (a) of the amended supplemental complaint for the following reasons:

The Fourteenth Amendment does not deny to Virginia the right to grant to each county and city local control of the education of its children, nor does it deny to Virginia the right to grant to each county and city of Virginia the option to provide for the educational needs of its children either in (1) public schools owned, operated and controlled by said counties or cities, or, if it prefers (2) to provide for such education by the payment of a sum for educational expenses to the parent or other person immediately responsible for such education in reimbursement of expenses so incurred.

In connection with this allegation the court will take judicial notice of Section 141 of the Constitution of Virginia and the provision of Title 22 of the Code of Virginia enacted in pursuance thereof.

It is, therefore, not sufficient merely to allege, as does the amended supplemental complaint, that Prince Edward has exercised a lawful right and elected to provide for the education of its children under Section 141 of the Constitution of Virginia and laws enacted in pursuance thereof.

It is essential in order to raise a federal constitutional question under the Fourteenth Amendment to allege that the laws of Virginia give some benefit or privilege to or impose some burden or disadvantage upon the county or city of the state which is not given to or imposed upon all counties or cities of the state, or, it must be alleged that the laws of the State of Virginia and of Prince Edward County give some benefit to or impose some disadvantage upon one individual or class which is not given [fol. 102] to or imposed under such law to or upon all children of the said County.

It is, therefore, apparent that where the law gives every county and city within the Commonwealth of Virginia the privilege, if it so elects, to provide for the education of its children in the same manner in which the County of Prince Edward has elected to provide for its children, such law and arrangement does not deny equal protection as between the counties and cities of the Commonwealth of Virginia.

The county ordinances exhibited with the supplemental complaint show upon their face that they apply equally within the County to all individuals and classes and are, therefore, not in violation of the Constitution of the United States. The equal administration of said county ordinances is not brought into question by any allegation of the amended supplemental complaint.

It, therefore, follows that there is no sufficient allegation contained in the amended supplemental upon which to base a charge of a violation of equal protection or due process under the Fourteenth Amendment of the United States Constitution.

(7) Paragraph VI (17) alleges that acts otherwise lawful become unlawful if done for the purpose and in order to avoid placing the children of the County within schools which fall within terms of the court order of April 22, 1960. It is alleged that by doing such acts or by the failure to take affirmative acts a federal constitutional question is raised. Such an allegation is patently insufficient to raise any federal constitutional question and is patenty untenable. Neither the terms of the order of April 22, 1960,

[fol. 103] nor the language and judicial construction of the Fourteenth Amendment can be thus enlarged by the motive or purpose of a legislative body which enacts laws otherwise within its lawful constitutional power. The motives or purpose of the Board of Supervisors of Prince Edward County cannot change or alter or enlarge the express limits of the court order of April 22, 1960, nor change, alter or enlarge the language, nature and judicial construction of the Fourteenth Amendment of the Constitution of the United States. Unless the acts and laws referred to violate some right of the plaintiffs under the United States Constitution or are alleged to be administered in such a fashion as to deny the plaintiffs a right under the Constitution of the United States the motive and purpose of the legislative branch is utterly immaterial and irrelevant provided the legislative branch had the power to enact the laws referred to.

It is, therefore, respectfully submitted that the amended supplemental complaint should be dismissed and the plaintiff left to seek his remedies as he may be advised in the state courts.

Present: All the Justices

Record No. 5390.

Leslie Francis Griffin, Jr., an Infant, Suing by L. F. Griffin, Sr., his Father and Next Friend, and L. F. Griffin, Sr.,

v.

[fol. 104] Board of Supervisors of Prince Edward County

Opinion By Chief Justice John W. Eggleston
Richmond, Virginia, March 5, 1962

Original Petition for Writ of Mandamus

This is an original petition for a writ of mandamus filed by Leslie Francis Griffin, Jr., an infant, suing by L. F.

Griffin, Sr., his father and next friend, and L. F. Griffin, Sr., in his own right, hereinafter referred to as the petitioners, to compel the Board of Supervisors of Prince Edward county, sometimes hereinafter referred to as the respondent, to appropriate and make available to the School Board of that county sufficient funds for the operation and maintenance for the 1961-1962 school term, and subsequent terms, of such public free schools as in the judgment of the School Board the public welfare requires. The matter is before us on the petition, the answer and a stipulation, from which these facts appear:

Both petitioners are citizens of the Commonwealth of Virginia, residing in Prince Edward county. The infant petitioner is within the age limits of eligibility to attend public schools and possesses the qualifications necessary for admission thereto. His father, the adult petitioner, is a taxpayer of the Commonwealth and of Prince Edward county.

Beginning with the fiscal year 1959-1960, and thereafter for each succeeding fiscal year, the School Board has prepared and submitted to the Board of Supervisors an estimate of the amount of money deemed necessary for the [fol. 105] maintenance and operation of public schools in the county. For each of these fiscal years the Board of Supervisors has failed and refused to appropriate any money for such purpose. However, for the fiscal year 1961-1962, it appropriated the sum of $285,000 for "Educational Purposes in furtherance of the elementary and secondary education of children residing in Prince Edward county in private nonsectarian schools to be expended as may be provided by Ordinance and pursuant to Section 141 of the Constitution of Virginia," as amended.

The petition alleges that the respondent's failure and refusal to appropriate funds for the maintenance and operation of public free schools in the county was occasioned by the decision of the United States Court of Appeals for the Fourth Circuit on May 5, 1959, that white and colored children should be enrolled and taught together. *Allen* v. *County School Board of Prince Edward County*, 4 Cir., 266 F. 2d 507. However, in the petitioners' brief

it is "conceded" that the motives which prompted the inaction on the part of the Board of Supervisors are immaterial to the issues involved in the present litigation.

The petitioners further point out in their brief that "there are no Federal questions [involved] in this proceeding," and we perceive none.

The petition further alleges that "by reason of Article IX of the Constitution of Virginia, and particularly Sections 129 and 136 thereof, and the several statutes which have been enacted pursuant to said article, it is the duty of the respondent board of supervisors to appropriate money to be used by the County School Board of Prince Edward County for the maintenance and operation of such [fol. 106] public free schools as in the judgment of said school board the public welfare may require."

The respondent denies that these or any other provisions of the Constitution of Virginia, or of any statutes enacted by the General Assembly, "impose a duty upon the said Board of Supervisors to appropriate any revenue under its control for the operation of schools." It alleges that its failure to levy taxes and make appropriations for the maintenance and support of such schools are matters which "are wholly within the legislative discretion vested in said Board of Supervisors under the Constitution and laws of Virginia and are not subject to control by the judicial process of writ and mandamus as prayed for in the petition."

Thus the pleadings present to us these questions:

(1) What is the duty imposed by law on the Board of Supervisors of Prince Edward county with respect to appropriations for the maintenance and operation of public free schools? (2) Will a writ of mandamus lie to compel that Board to perform such duties as are imposed on it by law with respect to such appropriations?

The argument on behalf of the petitioners runs thus: Section 136 of the Constitution imposes on the Board of Supervisors the *mandatory duty* of levying and collecting local school taxes for establishing and maintaining such schools as in the judgment of the local school authorities the public welfare may require; the Board of Supervisors is a mere administrative agency with respect to such duties and is vested with no legislative discretion therein; hence,

mandamus will lie to require it to perform its duties in this respect.

[fol. 107] The substance of the argument of the Board of Supervisors is that it is the legislative department of the county; that in levying taxes and appropriating local funds it exercises a legislative function and is vested with a discretionary power as to what taxes, if any, will be levied and appropriated, and that such discretion is not subject to judicial control.

Section 136 of the Constitution reads thus:

> "Each county, city or town, if the same be a separate school district, and school district is *authorized* to raise additional sums by a tax on property, subject to local taxation, not to exceed in the aggregate in any one year a rate of levy to be fixed by law, to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require; provided that such primary schools as may be established in any school year shall be maintained at least four months of that school year, before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade. The board of supervisors of the several counties, and the councils of the several cities and towns, if the same be separate school districts, shall provide for the levy and collection of such local school taxes." (Emphasis added)

Article IX of the Constitution, embracing the subjects of "Education and Public Instruction," contemplates that moneys for the establishment and maintenance of public free schools will be appropriated partly by the General [fol. 108] Assembly and partly by the local governing units. Section 136 provides for the raising by local taxation of "additional sums", that is, sums in addition to those which the General Assembly may appropriate pursuant to the preceding sections of the Constitution.

The provisions of Section 136 are implemented in Code, SS 22-126 and 22-127, as amended. Section 22-126, as amended, reads as follows:

"Each county, city and town if the town be a separate school district, *is authorized* to raise sums of money by a tax on all property, subject to local taxation, at such rate as may be deemed sufficient, but in no event more than three dollars on the one hundred dollars of the assessed value of the property in any one year to be expended by the local school authorities in establishing, maintaining and operating such schools as in their judgment the public welfare requires and in payment of scholarships for the furtherance of elementary or secondary education and transportation costs as required or authorized by law; * * *" (Emphasis added.)

Section 22-127, as amended, reads:

"The governing body of any county, city, or town, if the town be a separate school district, *may, in its discretion,* make a cash appropriation, either annually, semi-annually, quarterly, or monthly, from the funds derived from the general county, city or town levy and from any other funds available, of such sums as in its judgment may be necessary or expedient for the establishment, maintenance and operation of public schools, and/or for educational purposes." (Emphasis added.)

[fol. 109] We find in neither Section 136 of the Constitution nor in the statutes implementing it, any support for the petitioners' contention that the Board of Supervisors is under the mandatory duty to levy local taxes and appropriate moneys for the support of public free schools in the county.

By the first sentence of the Constitutional provision the local political unit "is authorized" to raise additional sums, to be apportioned and expended by the local school authorities. It will be noted that such political unit "is authorized," not "required," to raise the additional sums. The words "is authorized" denote a grant of power and discretion to act, but not a command or requirement to act. According to Webster's Third New International Diction-

ary, Unabridged, "authorized" means "endowed with authority," "sanctioned by authority." As we said in *Superior Steel Corp.* v. *Commonwealth*, 147 Va. 202, 205, 136 S.E. 666, 667, "one is 'authorized' when he possesses the authority to act."

Nor do we agree with the contention on behalf of the petitioners that the closing sentence of the constitutional provision, "The boards of supervisors of the several counties, and the councils of the several cities and towns, if the same be separate school district, shall provide for the levy and collection of such local school taxes," imposes a mandatory duty on the Board of Supervisors to levy and appropriate these moneys. This sentence merely designates the governing bodies of the respective political units which "shall provide for the levy and collection of *such* local school taxes" (emphasis added), that is, the local school taxes which are "authorized" tc be levied by the first sentence in the section.

[fol. 110] This interpretation of the constitutional provision is quite in accord with our previous decisions. In *School Board of Carroll County* v. *Shockley*, 160 Va. 405, 168 S.E. 419, we had under consideration an act of the General Assembly requiring the board of supervisors of Carroll county to make a special levy, in addition to all other levies, and directing that the proceeds of such special levy be used solely for the purpose of erecting and equipping a high school building in the town of Hillsville in that county. We held that the act was in conflict with Section 136 of the Constitution which lodged in the local authorities the exclusive power to determine what additional sums, if any, should be raised by local taxation, and that that power could not be taken away by the General Assembly.

After reviewing the various provisions of Article IX of the Constitution relating to "Education and Public Instruction," and what funds must be appropriated by the General Assembly for that purpose, we thus defined the purpose and meaning of Section 136:

> "Considering these clear and unqualified provisions, as placed in the Constitution, and in connection with the related provisions thereof, it is obvious that it

> was the purpose of this section to vest in the local authorities of each county and school district of the State the *exclusive power* to determine *what additional sums, if any,* should be raised by local taxation to supplement the funds provided by the State for the support of the schools in the respective counties and school districts; and the *exclusive power* to levy the tax for school purposes on the property specified, *if any is imposed,* subject only to the limitation that *if any tax at all is levied* it shall not 'exceed in the ag- [fol. 111] gregate in any one year a rate of levy to be fixed by law'. (Emphasis added)
>
> "The local authorities of each county and school district being thus vested with the exclusive power to impose local taxes for school purposes under this section, the necessary implication is that the General Assembly is prohibited by the Constitution from exercising that power." 160 Va., at page 413.

This interpretation, which is quite applicable in the present case, was reaffirmed in *Almond* v. *Gilmer,* 188 Va. 1, 26, 49 S.E. 2d 413, 444.

This discretionary nature of the right, power, or authority of the board of supervisors to determine what sums, if any, should be raised by local taxation for the support of public schools was also reaffirmed in *Scott County School Board* v. *Board of Supervisors,* 169 Va. 213, 217, 193 S.E. 52, 54. In that case the county school board filed in this court an original petition for mandamus to compel the board of supervisors to impose a levy sufficient "to take care of the budget" prepared by the school board. The school board asserted that the board of supervisors had "no discretion in acting upon the school budget," but "must raise the necessary revenue to take care of "such budget as submitted. (169 Va. at page 215, 193 S.E., at page 53.) We denied the writ on the ground that mandamus did not lie "to control [the] discretion" to curtail the school budget which the statutes (Code of 1919, S 657)[1] had lodged in the board of supervisors. 169 Va., at page 217, 193 S.E. at page 54.

[1] Cf. Code of 1950, 1960 Cum. Supp., SS 22-120.3 and 22-120.4.

[fol. 112] See also, *Board of Supervisors of Chesterfield Co.* v. *County School Board,* 182 Va. 266, 280, 281, 28 S.E. 2d 698, 705 in which we affirmed the holding of the trial court that "the board of supervisors has the right, within the limits prescribed by law, *in their discretion,* to fix the amount of money to be raised by local taxation for school purposes at whatever amount they see fit." (Emphasis added.)

It is clear, then, that Section 136 of the Constitution and Code, SS 22-126 and 22-127, as amended, which implement the constitutional provision, vest in the Board of Supervisors of Prince Edward county the discretionary power and authority to determine "what additional sums, if any, should be raised by local taxation to supplement the funds provided by the State for the support of the schools" in the county. *School Board of Carroll County* v. *Shockley, supra,* 160 Va., at page 413.

Whatever may be the duty imposed under Section 129 of the Constitution, that section is plainly directed to the General Assembly and not to the local governing bodies. It says, "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." Hence, we are not concerned in the present proceeding with the application of that provision. But it is important to compare the mandatory wording of that section with the discretionary language employed in Section 136.

We do not agree with the petitioners' contention that the concluding sentence of Section 136, which provides that "The board of supervisors of the several counties, and the councils of the several cities and towns, * * * shall [fol. 113] provide for the levy and collection of such local taxes," imposes on these local governing units merely ministerial duties. There is no constitutional mandate as to how these levies and collections shall be made, and as we have said, the concluding sentence of the section vests this function in these local governing units. This is in accord with the provision in Section 111 of the Constitution that boards of supervisors of a county "may * * * lay the county and district levies."

Since the early days of the Commonwealth, we have repeatedly pointed out that the exercise of the power of

taxation is a legislative function. See 18 Mich. Jur., Taxation, S 5, p. 127 *ff.*, where numerous cases are collected. The same is true when the power is exercised by a local governing unit. *Southern Railway Co.* v. *City of Danville*, 175 Va. 300, 305, 7 S.E. 2d 896, 898.

It is firmly settled in this State that mandamus is the proper remedy to compel the performance of a purely ministerial duty, but does not lie to compel the performance of discretionary duty. 12 Mich. Jur., Mandamus, S 6, p. 340 *ff.*; Burks Pleading and Practice, 4th Ed., S 199, p. 322; *Scott County School Board* v. *Board of Supervisors, supra*, 169 Va., at page 217, 193 S.E., at page 54; *State Board of Education* v. *Carwile*, 169 Va., 663, 673, 194 S.E. 855, 859; *Fleenor* v. *Dorton*, 187 Va., 659, 664, 47 S.E. 2d 329, 332.

Whether mandamus will lie to compel the levy and assessment of taxes depends upon whether the duty with respect to that matter is ministerial or discretionary. If ministerial, the writ will lie; if discretionary, as is the case here, mandamus will not lie. 34 Am. Jur., Mandamus, S. [fol. 114] 214, pp. 982, 983; 55 C.J.S. Mandamus, S 182-b (4), pp. 355, 356. Application of this distinction has been recognized and applied in prior decisions of this court.

In *Supervisors of Cumberland County* v. *Randolph*, 89 Va. 614, 16 S.E. 722, relied upon by the petitioners, we affirmed a judgment of the county court awarding a mandamus compelling the board of supervisors to levy a tax to pay certain coupons on bonds which had been issued by the county. This was because, we said, the particular statute there involved required the levy and made the duties of the board of supervisors with respect thereto "purely ministerial". 89 Va., at page 622.

On the other hand, in *Scott County School Board* v. *Board of Supervisors, supra*, we denied a writ to compel the board of supervisors to impose a levy sufficient to take care of the budget prepared by the school board, on the ground that mandamus did not lie to control the discretion which had been lodged in the board of supervisors with respect to the matter. 169 Va. at page 217, 193 S.E. at page 54.

It is not our function here to say whether the action of the Board of Supervisors of Prince Edward county in refusing to make these appropriations is proper, wise, or desirable. Our duty is merely to determine whether it may be compelled to do so by a writ of mandamus. In our view it may not be so compelled.

The Constitution of Virginia vests in the legislative department of the government the duty, power and authority to establish and maintain public free schools throughout the State. To grant the writ in this proceeding would [fol. 115] amount to an invasion by the judicial department of those functions of the legislative department. It would mean that this court may substitute its discretion for that vested by law in the local legislative body. Clearly, under the division of powers embodied in our Bill of Rights (Constitution, S 5), we may not do this.

For these reasons the writ prayed for is denied.

Writ denied.

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SECTION I

How Such Application Made, What It Shall Contain

A. The parent, guardian or person in loco parentis to any child shall make application for such grants upon forms provided by the Board of Supervisors of Prince Edward County, shall sign the same and make oath to the facts therein stated and shall file the same on or before the 1st day of September, 1960 or any succeeding year with the Board of Supervisors of Prince Edward County or with such person as the Board may designate to receive and examine such application.

B. The parent, guardian or person in loco parentis to such child in order to be eligible to receive a grant of funds under this ordinance shall, as a part of such application, make oaths to the following facts:

(a) The name of the parent, guardian or person in loco parentis making the application and the name, age and

[fol. 116] residence of each child on whose behalf the application is made.

(b) That the person signing the application is legally responsible for the care of each child for whose benefit the application is made.

(c) That each child in whose behalf the application is made has attained six years of age and has not attained the age of twenty years.

(d) That the said child is an actual bona fide resident of Prince Edward County and is educable.

(e) That each child on whose behalf the application is filed will be enrolled in either a private nonsectarian elementary or secondary school within the County of Prince Edward or a public school within the State of Virginia wherein tuition is charged in a least the amount of the grant applied for.

(f) That said child is not detained or confined in any public institution.

(g) That said child is or will be enrolled during the school year for which the application is made in a course of systematic educational instruction or training of not less than one hundred eighty days duration or the substantial equivalent thereof, and shall give the name and location of said school, or the name of the person, or persons, offering such course of instruction or training and the place at which it will be offered.

(h) That said child has not graduated or completed the course of study offered at the high school level.

[fol. 117] (i) That the person making the application agrees to refund any grant made thereunder if said child for whom the grant is made fails to attend school at least one hundred fifty days per school year, unless the Board of Supervisors by resolution releases such obligation to refund on account of sickness of the child or other unavoidable or oppressive circumstances.

Section II

Minimum Amount of Grant: Discretion to Increase the Amount; How and to Whom Paid; Termination Thereof . . .

(1) The amount of each grant paid under this Ordinance shall be a sum not less than One Hundred Dollars ($100.00) per year for each child and the amount thereof may be increased in the discretion of the Board of Supervisors by resolution adopted on or before the end of any fiscal year.

(2) Upon approval by the Board of Supervisors of the application therefor it shall by resolution make appropriation for the payment of each grant and shall authorize the Treasurer to make payment thereof upon warrants of the Board of Supervisors, as provided by law, for the payment of other claims against the County.

(3) Upon denial of an application or inability to act thereon because of the absence of necessary information, the Board shall give notice to the applicant of its action within a reasonable time thereafter by mailing said notice to the post office address given in the application. Within 15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Board shall file with [fol. 118] the Board or its designated agent a petition for a review of its action. Such petition shall state the reasons for his objection to the action of the Board and shall be heard by the Board at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(4) The Board of Supervisors shall pay not more than half of any grant on or before the 15th day of October of the school year for which paid and the remainder at such intervals as it may deem proper, provided that the

total amount thereof shall be paid not later than the 31st day of May of the school year for which the grant is made, and provided further that upon the violation of any condition set forth in the application therefor or upon the ascertainment that any false representation has been made in procuring said grant, the Board shall terminate the same and any balance thereof shall not be paid.

SECTION III

Defining Unlawful Acts in Violation of This Ordinance and Prescribing Penalty Therefore . . .

A. Any person who shall wilfully make a false statement in any application for a grant under this Ordinance shall [fol. 119] be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed three hundred dollars ($300.00) or by confinement in jail not exceeding 30 days.

B. It shall be unlawful and constitute a misdemeanor for any person, firm, association or corporation receiving a grant for educational purposes under this Ordinance to use the sum so received for any purpose other than for educational purposes in a private nonsectarian school located within the County of Prince Edward or in public schools located within the State of Virginia. Any person violating this section shall be subject to a fine not exceeding three hundred dollars ($300.00) or confinement in jail not exceeding 30 days.

• • • • • • •

Be It Ordained by the Board of Supervisors of Prince Edward County, Virginia that:

(1) Contributions made by any person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia to a nonprofit nonsectarian private school located within said County of Prince Edward, Virginia may be deducted from the real and personal property taxes due the County of Prince Edward, Virginia by the person, association, firm, corporation or other taxpayer making such contribution for the year during which

said contribution was made, subject to the limitations set forth in this ordinance.

(2) For the purpose of this Ordinance, the term "private school" shall mean only those nonprofit, nonsectarian private elementary and secondary schools either in opera- [fol. 120] tion during the year for which the tax deduction or credit is claimed or chartered to begin operation within the year succeeding that for which the tax deduction or credit is claimed, which schools are located in the County of Prince Edward, Virginia and which offer or will offer during the time herein set forth a course of systematic educational instruction of not less than one hundred eighty days duration per school year or the substantial equivalent thereof.

(3) No credit shall be allowed for any contribution made to any private school under the provisions of this ordinance unless the person, association, firm, corporation or other taxpayer seeking such credit files with the Treasurer of the County of Prince Edward, Virginia at the time his, her, or its taxes are due and payable, To wit: On or before December the fifth in the year in which the levy is made, a voucher, receipt or canceled check showing the amount and date of the contribution and to whom made and his, her, or its affidavit setting forth the name and address of the school to which the contribution was made, the date thereof, the name and address of the person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia making such contribution, the amount thereof, and declaring that no scholarship, reduction in fees or charges, rebate or remission of charges or other benefit was granted such person, association, firm, corporation or other taxpayer or his or her children, or any child for which said person, association, firm, corporation or other taxpayer was the legal guardian or other person in loco parentis to such child directly or indirectly as a result of such contribution and declaring that no such refund, rebate, reduction in fees or charges or remission or charges or other benefit will be made to [fol. 121] such person, association, firm, corporation or taxpayer on account of such contribution.

Upon the presentation of such affidavit and supporting evidence of payment to the Treasurer of the County of Prince Edward he shall deduct from the amount of taxes due the County of Prince Edward by such person, firm, association, corporation or other taxpayer on account of real estate taxes or personal property taxes the amount of such contribution credit in no event to exceed 25 per centum of the total taxes due the County of Prince Edward on real estate and personal property by such taxpayer. When such person, firm, association, corporation or other taxpayer shall have paid the balance remaining of such taxes due by such person, firm, association, corporation or taxpayer to the County of Prince Edward, Virginia, he shall thereupon be discharged from any further liability for taxes assessed against his, her or its personal or real property by the County of Prince Edward, Virginia for the year in which such taxes were payable.

(4) Upon denial of an application for credit, the Treasurer shall give notice to the applicant of his action within a reasonable time thereafter by mailing said notice to the Post Office address given in the application. Within 15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Treasurer shall file with the Board or its designated agent a petition for a review of his action. Such petition shall state the reasons for his objection to the action of the Treasurer and shall be heard by the Board of Supervisors at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing [fol. 122] shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(5) The Treasurer of Prince Edward County shall in no case be liable upon his bond or otherwise for any credit

granted any person, firm, corporation, association or other taxpayer under this Ordinance provided the voucher, receipt or cancelled check and the affidavit required by this Ordinance executed by the person, firm, association or other taxpayer are filed with the Treasurer as herein required.

(6) It shall be unlawful and constitute a misdemeanor for any person falsely to claim a credit or seek to falsely claim a credit against his taxes not in accordance with the provisions of this Ordinance. Any person violating this Ordinance shall be subject to a fine not exceeding $300.00 or confinement in jail not exceeding thirty days.

[fol. 123]

APPENDIX

To The Brief of The State Board of Education And Superintendent of Public Instruction of the Commonwealth of Virginia

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[fol. 124]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 1333

EVA ALLEN, ET AL., Plaintiffs

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL., Defendants

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NOTICE OF APPEAL—Filed November 7, 1962

Notice is hereby given that the State Board of Education of the Commonwealth of Virginia and Woodrow W. Wilkerson, Superintendent of Public Instruction of the Commonwealth of Virginia, hereby appeal to the United States

Court of Appeals for the Fourth Circuit from the judgment entered by orders in the above-styled cause on October 10, 1962, and from so much thereof:

(1) As fails to grant and, in effect, denies the motion filed May 1, 1961, on behalf of the above-named appellants to dismiss the Amended Supplemental Complaint as to them for any of the grounds stated therein, said motion having been timely renewed in accordance with subsequent orders of the Court reserving decision thereon and permitting such renewals;

(2) As denies the motion of all defendants, including [fol. 125] above-named appellants, to dismiss, or in the alternative to abstain from determining the issues presented in, the Amended Supplemental Complaint;

(3) As restrains and enjoins the above-named defendants from processing or approving any applications for State scholarship grants from persons residing in Prince Edward County so long as the public schools of Prince Edward County remain closed; and

(4) As holds that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers, if this portion of said judgment order has such finality as permits appeal.

Robert Y. Button, Of Counsel for the State Board of Education of the Commonwealth of Virginia and the Superintendent of Public Instruction of the Commonwealth of Virginia.

Robert Y. Button, Attorney General of Virginia;
R. D. McIlwaine, III, Assistant Attorney General;
Supreme Court—State Library Building, Richmond 19, Virginia;

Frederick T. Gray, Special Assistant, State-Planters Bank Building, Richmond 19, Virginia.

[fol. 126] Certificate of service (omitted in printing).

In United States District Court

Motion to Dismiss—Filed May 1, 1961

Now come Woodrow W. Wilkerson, Superintendent of Public Instruction, and Colgate W. Darden, Lewis F. Powell, Jr., Gladys V. V. Morton, William J. Story, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., individually and constituting the State Board of Education, and move the Court to dismiss the amended supplemental complaint herein upon the following grounds:

1. The amended supplemental complaint alleges a new and distinct cause of action different from that which formed the basis of the original complaint and seeks relief foreign to the purposes of the original complaint against persons not parties to the original suit.

2. The Court is without jurisdiction to entertain the amended supplemental complaint because the suit sought to be maintained thereby is, in its direct purpose and effect, a suit against the Commonwealth of Vir- [fol. 127] ginia, which has not consented to be sued, and the judicial power of the United States does not extend to such suit.

3. The amended supplemental complaint fails to state a claim upon which relief can be granted.

4. The amended supplemental complaint does not state a case of which this Court should entertain jurisdiction in that the various provisions of Virginia law to which reference is made in the amended supplemental complaint have not been finally construed by the Supreme Court of Appeals of Virginia. As the constitutional issues presented by the amended supplemental complaint may be modified or removed if the provisions of law in question are first construed by the courts of the Commonwealth of Virginia, the amended supplemental complaint does not state a case of which a federal court should assume jurisdiction.

5. The amended supplemental complaint seeks to enjoin the enforcement, operation and execution of various statutes of the Commonwealth of Virginia upon the ground of the unconstitutionality of such statutes, and the requested relief may not be granted unless the application therefor is heard and determined by a district court of three judges in accordance with 28 U.S.C.A. 2284.

[fol. 128] 6. No actual controversy exists between the parties to this suit, nor is there any present clash of contending legal interests between the parties.

Woodrow W. Wilkerson, Superintendent of Public Instruction;

Colgate W. Darden, Lewis F. Powell, Jr., Gladys V. V. Morton, William J. Story, Jr., Leonard G. Muse, Louise F. Galleher, Mosby Garland Perrow, Jr., Individually and Constituting the State Board of Education,

By: ....., Of Counsel.

Frederick T. Gray, Attorney General of Virginia;
R. D. McIlwaine, III, Assistant Attorney General, Supreme Court—State Library Building, Richmond 19, Virginia.

Certificate of service (omitted in printing).

[fol. 129]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS TO DISMISS OR IN THE ALTERNATIVE TO ABSTAIN FROM DETERMINING THE ISSUES PRESENTED IN THE AMENDED SUPPLEMENTAL COMPLAINT AND TO DISMISS PLAINTIFFS' MOTION FOR FURTHER RELIEF—Filed May 1, 1962.

Now come all defendants herein, to-wit: County School Board of Prince Edward County, Virginia; T. J. McIlwaine, Division Superintendent of Public Schools; Board

of Supervisors of Prince Edward County; J. W. Wilson, Jr., Treasurer of said County; the individual members of the said State Board of Education; and Woodrow W. Wilkerson, Superintendent of Public Instruction, and without waiving their several motions heretofore filed which remain undetermined, but severally renewing and insisting upon the same, move the Court as follows:

1. To dismiss the Amended Supplemental Complaint and Motion of Plaintiffs for Further Relief, or in the alternative to abstain from exercising jurisdiction over the same until the Supreme Court of Appeals of Virginia has had submitted to it and has had opportunity to decide the question set forth in this Court's opinion of August 23, 1961, and in its order of November 16, 1961.

2. As their grounds for said motion, defendants recite the following sequence of events:

A. In recognition of the Federal doctrine of abstention, this Court, in its memorandum opinion of August 23, 1961, said that:

> "The question that must and should be judicially determined is: Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?"

[fol. 130] It further said:

> "Counsel for all parties having indicated that an appropriate suit would be forthwith instituted in the Virginia state courts, this Court will defer its ruling on this question until the Supreme Court of Appeals of Virginia has rendered its decision, provided that said suit is filed within sixty days from this date."

B. Within two and one-half weeks thereafter, to-wit, on September 8, 1961, Leslie Francis Griffin, Jr., an infant by L. F. Griffin, Sr., his father and next friend, and L. F. Griffin, Sr., two of the persons who are party plaintiffs in the instant case, acting through counsel who represent the

plaintiffs in the instant case, filed a petition for mandamus in the Supreme Court of Appeals of Virginia against the Board of Supervisors of Prince Edward County. The proceeding thereby instituted is hereinafter referred to as "the mandamus proceeding." In the mandamus proceeding the petitioners alleged, among other things, that by reason of Article IX of the Constitution of Virginia, and particularly Sections 129 and 136 thereof, and the several statutes which have been enacted pursuant thereto, it was the duty of the Board of Supervisors to appropriate money to be used by the County School Board for the maintenance and operation of public free schools within the County; and they also alleged that the failure so to appropriate funds was due to reaction to the opinion of the United States Court of Appeals for the Fourth Circuit in the instant case of May 5, 1959, and for no reason other than a determination not to appropriate money for the operation and maintenance of public schools wherein the races are taught together and the fact that by virtue of the opinions, orders and decrees entered in the instant case the School Board of the County would be required to permit children of [fol. 131] both races to be taught together in the public schools of the County. The prayer of the petition was that the Board of Supervisors be directed to appropriate and make available to the County School Board sufficient funds with which to operate and maintain such public schools as in the judgment of the School Board might be required, all of which will more fully appear from a copy of said petition found on page 5 of the printed Record in the mandamus proceeding, a copy of which Record is filed herewith and marked Exhibit "A." A copy of the petitioners' opening brief in the mandamus proceeding is filed herewith and marked Exhibit "B."

C. The Board of Supervisors of said County answered said petition as is shown by their answer appearing on page 8 *et seq.*, of said Record filed herein as Exhibit "A." Amid other things, they alleged that their acts did no violence to the Constitution of Virginia or the Constitution of the United States.

D. The pleadings in the mandamus proceeding having been brought to the attention of this Court, this Court in its order of November 16, 1961, recited:

> "It appearing from statement of counsel and the copy of the suit papers that an appropriate suit has been timely instituted in the Supreme Court of Appeals of Virginia, seeking a determination of the legal question posed in this Court's opinion of August 23, 1961, namely: 'Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the 14th Amendment?' "

[fol. 132] And this Court then determined:

> "The Court reserves further consideration of this question until there has been a final determination by the Supreme Court of Appeals of Virginia of the pertinent provisions of the United States Constitution, the Virginia Constitution and statutes adopted pursuant thereto."

E. The brief filed on behalf of the Board of Supervisors of Prince Edward County in the mandamus proceeding dealt extensively not only with the questions of State law but also with the questions of Federal law and whether the actions of the Board of Supervisors violated the Federal Constitution. A copy of said brief is filed herewith as Exhibit "C", and particular reference is made to pages 64-124 thereof.

F. Despite the terms of this Court's abstention order entered on November 16, 1961, the plaintiffs in the mandamus proceeding filed a reply brief in the mandamus proceeding on December 24, 1961, a copy of which is filed herewith marked Exhibit "D", in which they disclaimed the existence of a Federal question in the mandamus proceeding. The said brief contains a Section VI, beginning on page 20 thereof, the caption of which is "The Pleadings in This Case Present No Federal Question," and in which they asserted that not only were there no Federal questions involved in the mandamus proceeding but that this Court had:

"... abstained from decision of that question [i.e., the Federal question] pending this Court's [i.e., the Virginia Court's] determination whether *the Constitution and laws of Virginia* permit the respondent here, by withholding funds, to require public schools to be and to remain closed." (Emphasis added).

[fol. 133] No mention is made of the fact that the Federal Court was also awaiting the Virginia Court's determination of the questions arising under the Federal Constitution.

G. The plaintiffs in said mandamus proceeding having thus affirmatively disclaimed the submission of any Federal question to the Supreme Court of Appeals of Virginia and having thus removed any Federal question from the consideration of said Court, the Supreme Court of Appeals of Virginia, in its opinion handed down March 5, 1962, a copy of which is filed herewith and marked Exhibit "E", said:

"The petitioners further point out in their brief that 'there are no Federal questions [involved] in this proceeding,' and we perceive none."

H. Accordingly, the plaintiffs, with knowledge gained from this Court's order of November 16, 1961, that this Court was anticipating from the case then pending in the Supreme Court of Appeals of Virginia a "final determination by the Supreme Court of Appeals of Virginia of the pertinent provisions of the United States Constitution" and with knowledge, gained from the answer and brief of defendant filed in said case, that the defendant was seeking such determination, nevertheless by their subsequent action of December 24, 1961, frustrated and prevented such determination of the Supreme Court of Appeals of Virginia, thereby failing to comply with this Court's order of abstention. That the plaintiffs were aware of the full scope of the questions which this Court desired to have decided in the Supreme Court of Appeals of Virginia is made manifest by paragraph 3 of the "Motion For Further Relief."

For the foregoing reasons, the Amended Supplemental [fol. 134] Complaint and the Motion for Further Relief should be dismissed, or at least all further proceedings in this instant case should be stayed and the plaintiffs directed to submit to the Supreme Court of Appeals the question whether the actions of the Board of Supervisors as outlined in said petition for mandamus violates any provisions of the Constitution of the United States, and in the event of the failure of the plaintiffs so to submit said question within a reasonable time fixed by the Court, the said Amended Supplemental Complaint and Motion for Further Relief should be dismissed.

County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Public Schools,

By: ....., Of Counsel.

Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of said County,

By: ....., Of Counsel.

Members of the State Board of Education and Woodrow W. Wilkerson, Superintendent of Public Instruction,

By: ....., Of Counsel.

[fol. 135] Collins Denny, Jr., John F. Kay, Jr., Denny Valentine & Davenport, 1300 Travelers Building, Richmond 19, Virginia;

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Public Schools;

J. Segar Gravatt, Blackstone, Virginia;

Frank N. Watkins, Watkins and Brock, Farmville, Virginia, Counsel for Board of Supervisors of Prince Edward County, and J. W. Wilson, Jr., Treasurer of said County;

Robert Y. Button, Attorney General of Virginia;

R. D. McIlwaine, III, Assistant Attorney General, Supreme Court—State Library Building, Richmond 19, Virginia;

Frederick T. Gray, Special Assistant, State-Planters Bank Building, Richmond 19, Virginia, Counsel for Members of the State Board of Education and Woodrow W. Wilkerson, Superintendent of Public Instruction.

[fol. 136] Certificate of service (omitted in printing).

IN UNITED STATES DISTRICT COURT

MOTION FOR FURTHER RELIEF—Filed March 26, 1962

Now come the plaintiffs in the above-entitled cause and move this Court for further relief and for final disposition of this case and in support thereof show:

1. On November 16, 1961, this Court entered its order enjoining the defendants from processing or approving any application for state scholarship grants from persons residing in Prince Edward County, and from approving and paying out any county funds and allowing of tax credits authorized by the so-called Grant-in-Aid ordinance or the Tax credit ordinance of July 18, 1960, during such time as the public schools in Prince Edward County remain closed.

2. It was further ordered that defendant, the School Board of Prince Edward County, comply with the April 22, 1960, order of the Court requiring the aforesaid defendant to make plans for the admission of pupils of the elementary schools of Prince Edward County without regard to race or color.

3. The question as to whether the public schools could be closed in order to avoid compliance with the guarantees [fol. 137] of the Fourteenth Amendment prohibiting racial discrimination was reserved for further consideration until there had been a final determination by the Supreme Court of Appeals of Virginia of the "pertinent provisions of the United States Constitution, the Virginia Constitution and the statutes adopted pursuant thereto."

4. Prior to the above cited order of this Court, plaintiffs filed an original petition for writ of mandamus in the Supreme Court of Appeals requesting that Court to determine whether Article IX of the Constitution of Virginia, and particularly Sections 129 and 136 thereof, imposes a mandatory duty upon the defendant, the Board of Supervisors of Prince Edward County, to appropriate sufficient funds for the use of the County School Board to maintain and operate such free public schools in Prince Edward County as the public welfare may require.

5. On March 5, 1962, that court ruled that the Constitution and the laws of the Commonwealth of Virginia placed a discretionary, not mandatory, duty on the defendant, Board of Supervisors of Prince Edward County, to appropriate sufficient funds to maintain free public schools in the county. Since this duty was not mandatory, the failure of the Board to appropriate any funds to maintain the schools in Prince Edward County was declared not to be subject to judicial relief.

6. The injunctive decrees and order entered by this Court on November 16, 1961, by their terms are to become inoperative twenty (20) days from the date of the entry of the judgment and order of the Supreme Court of Appeals, which would leave defendants free to appropriate state scholarship grants, grants-in-aid and tax credit to support and provide funds for persons to attend the Prince [fol. 138] Edward School Foundation in the absence of public schools being maintained in the county and contrary to the intendment of this Court in both its memorandum opinion and judgment.

7. The state law questions as to the duties of the defendants having been determined by the Supreme Court of Appeals, this Court must now decide the federal constitutional issues in the light of that state law determination, to wit:

(a) Whether the failure of the Board of Supervisors of Prince Edward County to exercise its discretionary obligations under Article IX of the Constitution of Virginia

and to appropriate and provide funds sufficient to maintain an efficient free public school system in Prince Edward County constitutes a violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States?

(b) Whether such failure to appropriate funds to maintain a free public school system in order to avoid the maintenance and support of public schools free of racial discrimination as required by the federal Constitution and the decisions and mandate of this Court constitutes a denial of equal protection of the laws and due process of law as secured by the Fourteenth Amendment to the Constitution of the United States?

(c) In the light of the determination of the Supreme Court of Appeals that the Board of Supervisors is under a discretionary and judicially unenforceable duty to appropriate sufficient funds to maintain a free public school system in Prince Edward County, does the failure of the Commonwealth of Virginia to provide out of state funds whatever monies are necessary for the maintenance of an efficient free public school system in Prince Edward County constitute a denial of equal protection and due process of [fol. 139] law as secured by the Fourteenth Amendment to the Constitution of the United States?

(d) The Commonwealth of Virginia, pursuant to Article IX of the Constitution of Virginia and Title 22, Code of Virginia, 1950, as amended, has established a procedure and formula for a state wide operation and maintenance of free public schools in Virginia. Only in Prince Edward County is this formula and procedure not being effectuated. Does the failure, therefore, to effectuate and to implement the formula and procedure for maintenance of an efficient public school system in Prince Edward County, as provided in Article IX of the Constitution of Virginia, and Title 22, Code of Virginia, 1950, as amended, constitute a denial of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States?

(e) Does the failure effectuate the procedure and formula aforesaid for the maintenance and operation of free

public schools in Prince Edward County, in the light of the notorious and well-known fact that this formula and procedure are not being followed in Prince Edward County for the sole reason that local authorities are seeking to avoid compliance with the Fourteenth Amendment guarantee against racial discrimination, constitute a denial of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States?

8. It is plaintiffs' contention that the facts and the law require that this Court answer each of the above-cited questions in the affirmative and hold that the failure of the defendant Board of Supervisors to appropriate funds sufficient for free public schools, and the failure of the Commonwealth to provide free public schools, and the failure of the Commonwealth to effectuate the formula and procedure for the operation of the free public schools in Prince [fol. 140] Edward County constitute denials of equal protection and due process as secured under the Fourteenth Amendment to the Constitution of the United States and, therefore, that this Court should, after hearing, grant further and final relief to the plaintiffs, to wit:

(a) Enjoin the defendant Board of Supervisors from refusing to appropriate sufficient funds to maintain and operate an efficient public school system in Prince Edward County on the grounds that such failure constitutes a denial of equal protection and due process; or

(b) Enjoin the Commonwealth of Virginia from refusing to provide sufficient funds for the operation of the free public school system in Prince Edward County, in the light of the Board of Supervisors' failure to do so on the grounds that the state's failure to maintain a free public school system in the County constitutes a denial of due process and equal protection guaranties of the Fourteenth Amendment.

(c) Enjoin the Commonwealth of Virginia; the State Board of Education; the County School Board of Prince Edward County; T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County; the Board of Super-

visors of Prince Edward County; J. W. Wilson, Jr., Treasurer of Prince Edward County; Woodrow W. Wilkerson, Superintendent of Public Instruction; Garland Gray, Lewis F. Powell, Jr., Anne Dobie Peebles, C. Stuart Wheatley, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., individually and as constituting the State Board of Education; and all other persons who may be concerned, as well as their assigns, successors in office and persons in concert with them from failing and refusing to implement and effectuate in Prince Edward County the provisions of Article IX of the Constitution of Virginia and [fol. 141] Title 22, Code of Virginia, 1950, as amended, establishing the state-wide procedure and formula for the maintenance and operation of free public schools in Virginia, on the ground that the failure to implement and effectuate these provisions as aforesaid constitutes a denial of equal protection and due process as secured by the Fourteenth Amendment to the Constitution of the United States.

(d) Make final and permanent the injunctive decrees heretofore entered against the defendants in the November 16, 1961, order of this Court.

9. Plaintiffs request a speedy hearing and early determination of the questions and issues herein raised.

Respectfully submitted,

S. W. Tucker, Of Counsel for Plaintiffs.

Robert L. Carter, 20 West 40th Street, New York 18, New York;

S. W. Tucker, Henry L. Marsh, III, 214 East Clay Street, Richmond 19, Virginia;

Otto L. Tucker, 901 Princess Street, Alexandria, Virginia, Attorneys for Plaintiffs.

Certificate of service (omitted in printing).

[fol. 143] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

PRINCE EDWARD COUNTY SCHOOL BOARD, et al., Defendants.

UNITED STATES, Applicant for Intervention.

MOTION TO INTERVENE AS A PLAINTIFF AND TO ADD DEFENDANTS—Filed April 26, 1961

The United States, by Robert F. Kennedy, Attorney General, and Joseph S. Bambacus, United States Attorney for the Eastern District of Virginia, moves for leave to intervene as a plaintiff in this action and to file the complaint in intervention, a copy of which is attached hereto, and to add as parties defendant the persons and corporations named as additional defendants in the complaint in intervention.

As appears from the complaint in intervention, intervention by the United States, and the adding of the persons and corporations named in the complaint in intervention as parties defendant, is necessary in order to prevent the circumvention and nullification of the prior orders of this Court and to safeguard the due administration of justice and the integrity of the judicial processes of the United States.

[fol. 144] The claim of the United States, as set forth in the complaint in intervention, involves questions of both law and fact in common with those raised by the amended supplemental complaint filed by the plaintiffs herein.

This motion is made under and pursuant to Sections 309 and 316 of Title 5 of the United States Code and Rule 24 of the Rules of Civil Procedure.

Robert F. Kennedy, Attorney General;

Burke Marshall, Assistant Attorney General;

Joseph S. Bambacus, United States Attorney.

[fol. 145] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

PRINCE EDWARD COUNTY SCHOOL BOARD, et al., Defendants.

UNITED STATES, Applicant for Intervention.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION OF THE UNITED STATES OF AMERICA
TO INTERVENE AND TO ADD PARTIES DEFENDANT
—Filed April 26, 1961

I.

The District Courts of the United States have jurisdiction to enjoin interference with and obstruction to the implementation of their orders requiring operation of public schools on a racially non-discriminatory basis.

Faubus v. *United States*, 254 F. 2d 797 (C.A. 8, 1958), cert. den. 358 U.S. 829;

Kasper v. *Brittain*, 245 F. 2d 92 (C.A. 6, 1957), cert. den. 355 U.S. 834;

Bullock v. *United States*, 265 F. 2d 683 (C.A. 6, 1959), cert. den. 360 U.S. 932;

Kelley v. *Board of Education of the City of Nashville*, 2 R.R.L.R. 976-983 (D.C. M.D. Tenn., 1957).

[fol. 146] II.

Obstruction to and circumvention of school desegregation decrees violate the interests of the United States in the due administration of justice as well as the interest of the original plaintiffs in the desegregation suit.

Faubus v. *United States, supra;*

Bush v. *Orleans Parish School Board*, 190 F. Supp. 861 (D.C. E.D. La., Nov. 30, 1960);

Bush v. *Orleans Parish School Board*, —— F. Supp. —— (D.D. E.D. La., Mar. 3, 1961).

III.

The United States, in its sovereign capacity, may seek relief in its courts against the violation of such interest.

In re Debs, 158 U.S. 564, 584;

United States v. *California*, 322 U.S. 19;

Sanitary District of Chicago v. *United States*, 266 U.S. 405, 425-6;

Kern River Company v. *United States*, 257 U.S. 147, 154-5;

United States v. *San Jacinto Tin Company*, 125 U.S. 273, 278-80, 248-51;

United States v. *Louisiana, sub nom. Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916 (D.C. E.D. La., Nov. 30, 1960);

Faubus v. *United States, supra;*

Bush v. *Orleans Parish School Board* (Mar. 3, 1961), *supra.*

IV.

The closing of public schools to avoid compliance with a desegregation decree while schools elsewhere in the state remain open is an unlawful obstruction to the carrying out of such decree, and the diversion of state funds from the [fol. 147] closed schools to privately operated segregated schools is an unlawful circumvention of such decree.

James v. *Almond*, 170 F. Supp. 331 (D.C. E.D. Va., 1959), appeal dismissed 359 U.S. 1006;

James v. *Duckworth*, 170 F. Supp. 342 (D.C. E.D. Va., 1959);

Aaron v. *McKinley*, 173 F. Supp. 944 (D.C. E.D. Ark., 1959), aff'd. *sub nom. Faubus* v. *Aaron*, 361 U.S. 197;

And see *Brown* v. *Board of Education*, 347 U.S. 483 (1954) at p. 493;

Bush v. *Orleans Parish School Board*, 188 F. Supp. 916, 928 (D.C. E.D. La., 1960).

V.

The United States having a claim for relief against unlawful obstruction and circumvention of this Court's prior decrees, and the claim having questions of law and fact in common with those raised by the plaintiffs' amended supplemental complaint, the motion to intervene should be granted.

5 U. S. C. 309;

5 U. S. C. 316;

Rule 24, Rules of Civil Procedure;

And see *Securities & Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U.S. 434.

Burke Marshall, Assistant Attorney General;

Joseph S. Bambacus, United States Attorney;

St. John Barrett, Department of Justice.

[fol. 148]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

UNITED STATES OF AMERICA, Intervenor,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY; T. J. McILWAINE, Division Superintendent of Schools of Prince Edward County; BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY; J. W. WILSON, JR., Treasurer of Prince Edward County; PRINCE EDWARD SCHOOL FOUNDATION, a Corporation; THE COMMONWEALTH OF VIRGINIA; WOODROW W. WILKERSON, State Superintendent of Public Instruction of Virginia; COLGATE W. DARDEN, LEWIS F. POWELL, JR., GLADYS V. V. MARTIN, WILLIAM F. STORY, JR., LEONARD G. MUSE, LOUISE F. GALLEHER and MOSBY GARLAND PERROW, JR., members of the State Board of Education of Virginia, and SYDNEY C. DAY, Comptroller of Virginia, Defendants.

COMPLAINT IN INTERVENTION

The United States, as a claim against the defendants, alleges that:

1. This proceeding is brought against the County School Board of Prince Edward County (hereafter referred to [fol. 149] as the County School Board; T. J. McIlwaine, Division Superintendent of Schools of Prince Edward

County; the Board of Supervisors of Prince Edward County (hereafter referred to as the Board of Supervisors); J. W. Wilson, Jr., Treasurer of Prince Edward County; Colgate W. Darden, Lewis F. Powell, Jr., Gladys V. V. Martin, William F. Story, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., members of the State Board of Education of Virginia, and Woodrow W. Wilkerson, Superintendent of Public Instruction of Virginia, each of whom has been previously named and served as a defendant in this case.

2. This proceeding is also brought against the Commonwealth of Virginia (hereafter referred to as the State), the Prince Edward School Foundation, a corporation (hereafter referred to as the Foundation), and Sydney C. Day, Jr., Comptroller of Virginia.

3. The Commonwealth of Virginia is a state of the United States. Its principal executive and legislative offices are located in Richmond, Virginia.

4. Sydney C. Day, Jr., is Comptroller of Virginia, and as such is authorized under the laws of Virginia to draw warrants upon the state treasury for the disbursement of state funds for school and educational purposes. He resides in Richmond, Virginia.

5. The Prince Edward School Foundation is a corporation organized and existing under the laws of Virginia. Its office and principal place of business is in Prince Edward County, Virginia.

6. Section 129 of the constitution of Virginia requires that the General Assembly establish and maintain a system of public free schools throughout the state. In dis- [fol. 150] charge of this responsibility the General Assembly has enacted legislation, appearing in Title 22 of the Code of Virginia, providing for such a system.

7. At all times herein mentioned prior to June 1959, the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction maintained a system of public free schools in Prince Ed-

ward County. This system of schools provided public education at the elementary and high school levels for approximately 3100 pupils, of whom approximately 1700 were Negro and 1400 white. Separate schools were maintained for the white and Negro races.

8. On May 17, 1954, the Supreme Court of the United States reversed the judgment of this Court entered in this case on March 7, 1952, and held that state operation of racially segregated schools in Prince Edward County was a denial of the equal protection of the laws secured by the Fourteenth Amendment to the Constitution.

9. In July 1954 the Board of Supervisors of Prince Edward County adopted a resolution expressing opposition to the operation of racially non-segregated public schools.

10. On July 18, 1955, this Court, having received the mandate of the Supreme Court in this case, entered its order requiring that the public schools of Prince Edward County be racially desegregated with all deliberate speed.

11. On May 3, 1956, the Board of Supervisors held a public meeting in which they received and directed to be filed with the records of the Board a petition signed by [fol. 151] approximately 4000 white citizens of Prince Edward County stating that they preferred to abandon public schools rather than to have the children of the county educated on a racially non-segregated basis. At the meeting the Board of Supervisors adopted a resolution declaring it to be the policy of the Board that no county tax levy should be made for the operation of public schools on a racially non-segregated basis. At the meeting those in attendance adopted a "declaration of conviction" asking the Board of Supervisors to enact ordinances and regulations to prohibit the levying of any tax or the appropriation of any funds for the operation of "racially-mixed schools within Prince Edward County to the end that all public schools of the county may be closed upon the entry of a court order requiring the mixing of the races in any school of this county." This declaration was

received by the Board of Supervisors and filed with the records of the Board. Copies of the affirmation, resolutions and declaration of convictions are attached hereto as Appendix A.

12. On May 5, 1959, the Court of Appeals for the Fourth Circuit reversed an order entered by this Court on August 4, 1958, and directed the entry of an order requiring that the public high schools of Prince Edward County be operated on a racially non-discriminatory basis commencing with the fall semester, 1959.

13. On May 26, 1959, William F. Watkins, Jr., W. J. Gills, Jr., and J. Barrye Wall, Jr., each a resident of Prince Edward County, executed articles of incorporation for the Prince Edward School Foundation for the purpose of operating, through the instrumentality of the Foundation, elementary and high schools in Prince Ed- [fol. 152] ward County for the education of children of the white race, exclusively.

14. On May 29, 1959, the State Corporation Commission of Virginia issued a certificate of incorporation to the Prince Edward School Foundation to operate nonprofit private schools in Prince Edward County, Virginia.

15. On June 2, 1959, the Board of Supervisors adopted a resolution that the Board would levy no taxes for the operation of public schools in Prince Edward County for the 1959-60 school year. In connection with this resolution the Board of Supervisors, through its chairman, issued a formal statement that it was not possible to operate the public schools of Prince Edward County within the terms of the order of this Court.

16. On June 3, 1959, the Board of Supervisors voted its approval of a county budget making no provision for operation of public schools. The Board fixed the tax levy for the fiscal year 1959-60 at $1.60 per one hundred dollars of assessed valuation on all taxable property located outside of Farmville, at $1.50 for all property located in Farmville other than personal property classified as merchants' capital invested in the county, and $0.30 upon all

such merchants' capital. The corresponding levies upon these categories of property had been, in both 1957 and 1958, $3.40, $3.30, and $0.80, respectively.

17. Public schools in Prince Edward County were not opened for the fall semester 1959 and have not been open since that time.

18. In September 1959 the Prince Edward School Foundation employed teachers and offered courses of [fol. 153] instruction for white children residing in Prince Edward County. Approximately 1400 white children, comprising virtually the entire white population of school age in Prince Edward County, were enrolled by the Foundation. No tuition or other fees were exacted for the instruction of these students.

19. The Prince Edward School Foundation employed for the school year 1959-1960, and is now employing, approximately fifty-nine of the seventy white teachers who had been employed by the County School Board the preceding year and who had taught in the public schools.

20. The Prince Edward School Foundation financed the operation of schools for white children during the 1959-60 school year through contributions. In soliciting contributions the Foundation urged property owners to donate sums saved by them on account of the reduction in tax levies for the fiscal year 1959-60 as described in paragraph 16.

21. On April 22, 1960, this Court, on remand from the decision of the Court of Appeals of May 5, 1959, entered an order enjoining the County School Board and the Division Superintendent from any action that regulates or affects on the basis of race or color the admission, enrollment or education of Negro children to the public high schools of the county and requiring the County School Board and the Division Superintendent to make plans for the admission of pupils in the elementary schools of the county without regard to race or color, and to receive and consider applications to that end at the earliest practical day.

22. In June 1960 the Board of Supervisors adopted a county budget for fiscal 1960-61 providing approximately [fol. 154] $270,000 for educational purposes, but without providing funds to permit operation of the public schools. On the basis of this budget the Board of Supervisors fixed the tax levy for the fiscal year 1960-61 at $4.00 per one hundred dollars of assessed valuation on all taxable property outside Farmville, at $3.90 for all property located in Farmville other than personal property classified as merchants' capital invested in the county, and $0.80 upon all such merchants' capital.

23. On July 18, 1960, the Board of Supervisors, acting under authority of Sec. 19.1 of Title 58 of the Code of Virginia, adopted an ordinance requiring the County Treasurer to allow as a credit against real and personal property taxes due the county any contributions, not in excess of 25 per cent of the amount of the taxes due, made by a taxpayer to any non-profit, non-sectarian private school located within Prince Edward County. The text of this ordinance is attached hereto as Appendix B.

24. On July 18, 1960, the Board of Supervisors, acting under authority of Chapter 7.3 of Title 22 of the Code of Virginia, adopted an ordinance providing for grants of county funds to parents of children between the ages of six and twenty years, residing in Prince Edward County, who enrolled in private non-sectarian elementary or secondary schools within the county, or in public schools within the State of Virginia. The ordinance provides that each grant shall be not less than $100 per year for each child. The text of this ordinance is attached hereto as Appendix C.

25. The only private, non-sectarian elementary or sec- [fol. 155] ondary schools operating in Prince Edward County on July 18, 1960, or which have been established and operating since that time, attendance at which qualifies a student to a tuition grant under the Board of Supervisors ordinance referred to in the preceding paragraph, are the schools of the Prince Edward School Foundation.

26. Taxpayers of Prince Edward County have, since the adoption of the ordinance referred to in paragraph 23, claimed $58,866 in tax credits on account of contributions to the Prince Edward School Foundation.

27. The Foundation has 1376 white children enrolled for the 1960-1961 school year.

28. The Foundation has financed and is financing its educational program for the 1960-1961 school year by charging tuition in the amount of $240 for each child enrolled in elementary schools and $265 for each child enrolled in high school, as well as by contributions.

29. Of the $240 in tuition paid to the Foundation for each elementary school student, $100 has been or is being reimbursed to the parent or guardian by Prince Edward County pursuant to the ordinance of the Board of Supervisors described in paragraph 24, and $125 has been or is being reimbursed by the State pursuant to the provisions of the Code of Virginia, Title 22, Chapter 7.3, Article 1. Of the $265 in tuition paid to the Foundation for each high school student, $100 has been or is being reimbursed by Prince Edward County pursuant to the ordinance of the Board of Supervisors described in paragraph 24, and $150 has been or is being reimbursed by the State pursuant to the provisions of the Code of Virginia, Title 22, Chapter 7.3, Article 1.

[fol. 156] 30. The County School Board has been and is receiving and processing applications for reimbursement of tuition as described in the preceding paragraph. For the 1960-61 school year, the County School Board has received and approved 1,325 applications by white children attending the schools of the Prince Edward School Foundation. It has approved no other applications for tuition grants for attendance in "non-sectarian private" schools.

31. On December 6, 1960, a number of Negro residents of Prince Edward County presented a signed petition to the Board of Supervisors asking that the public schools of the county be reopened. This request was rejected by the Board of Supervisors.

32. Since June 1959 the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction have failed and refused to maintain a system of public free schools in Prince Edward County. The purpose and effect of this failure and refusal has been and is to prevent the operation of public schools in Prince Edward County in compliance with the orders of this Court requiring their operation on a racially nondiscriminatory basis.

33. Since June 1959 the County School Board, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction have maintained the schools of the Prince Edward School Foundation for the education of white children residing in Prince Edward County.

34. Since June 1959 no schools have been maintained and operated in Prince Edward County for the education [fol. 157] of Negro children residing in the county.

35. A system of public free schools is being maintained by the State, the State Board of Education and the State Superintendent of Public Instruction in all counties and cities of the State other than Prince Edward County, and warrants for payment of state funds in connection with the maintenance of such system have been and are being drawn upon the state treasury by the Comptroller.

36. The maintenance and operation of the schools of the Prince Edward School Foundation on a racially discriminatory basis, with the financial assistance of the county and State, circumvents this Court's order requiring the public schools of Prince Edward County to be operated without racial discrimination.

37. The failure and refusal of the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction to maintain and operate a system of public free schools in Prince Edward County, while such a system is being maintained and operated

throughout the rest of the state, denies to Negro residents and taxpayers of the county rights secured by the Fourteenth Amendment to the Constitution.

38. Plaintiff, having the duty to represent the public interest in the administration of justice and the preservation of the integrity of the processes of this Court, has no remedy against the unconstitutional and illegal acts of the defendants herein named, other than this action for an injunction, and unless such injunction issue the plaintiff will [fol. 158] suffer immediate and irreparable injury consisting of the impairment of the integrity of the judicial process, the obstruction of the due administration of justice, and the deprivation of rights under the Constitution and laws of the United States.

Wherefore, Plaintiff respectfully prays that this Court enter an order:

(a) enjoining the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education, and the State Superintendent of Public Instruction from failing or refusing to maintain in Prince Edward County a system of public free schools;

(b) enjoining the County School Board, the Board of Supervisors, the State, the State Board of Education, the State Superintendent of Public Instruction, and the State Comptroller from approving, paying, or issuing warrants for the payment of tuition grants for students attending the Prince Edward School Foundation, for so long and during such period as the public schools of Prince Edward County are closed and a system of public free education is not maintained in Prince Edward County;

(c) enjoining the Board of Supervisors and the County Treasurer from allowing any credit to taxpayers on account of contributions to the Prince Edward School Foundation for so long and during such period as the public schools of Prince Edward County [fol. 159] are closed and a system of public free education is not maintained within the county;

(d) enjoining the State, the State Board of Education, the State Superintendent of Public Instruction, and the State Comptroller from approving, paying, or issuing warrants for the payment of any funds of the State for the maintenance or operation of public schools anywhere in Virginia for so long and during such period as the public schools of Prince Edward County are closed and a system of public free schools is not maintained within the County, and

(e) enjoining all of the defendants from otherwise interfering with, obstructing, or circumventing the orders of this Court requiring operation of the public schools of Prince Edward County on a racially nondiscriminatory basis.

Plaintiff further prays that the Court grant such additional relief as the interests of justice may require.

Robert F. Kennedy, Attorney General; Burke Marshall, Assistant Attorney General; Joseph S. Bambacus, United States Attorney.

[fol. 160]

APPENDIX A TO COMPLAINT IN INTERVENTION

Affirmation

We, the undersigned citizens of Prince Edward County, Va., hereby affirm our conviction that the separation of the races in the public schools of this county is absolutely necessary and do affirm that we prefer to abandon public schools and educate our children in some other way if that be necessary to preserve separation of the races in the schools of this county.

We pledge our support of the Board of Supervisors of Prince Edward County in their firm maintenance of this policy.

Note.—This affirmation has been signed by 4,216 citizens over 21 years of age in the county which is 1,000 more than the total qualified registered voters.

Resolutions

At a regular meeting of the Board of Supervisors of Prince Edward County held at the courthouse thereof, on the 3rd day of May 1956, at which meeting all members of the board were present, the following resolutions were adopted unanimously:

I

Be it resolved by the board of supervisors, That we do hereby express to the people of Prince Edward County our gratitude that they have made known to this board so clearly their views upon the grave problems with which we are confronted with respect to our schools. The support of our people makes the burden of our responsibilities lighter and the course of our future action clearer. We trust the people of the county will continue to make known to us their views as we go forward to meet our problems together.

II

Be it resolved, That the Board of Supervisors of Prince Edward County as the elected representatives of the people of Prince Edward County, do hereby declare it to be the policy and intention of said board in accordance with the will of the people of said county that no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any plan or arrangement whatsoever.

III

Be it resolved by the Board of Supervisors of Prince Edward County, That the Governor of Virginia, the superintendent of public instruction, and the State Board of Education are hereby requested to pay any State revenue to the School Board of Prince Edward County in support of public schools in accordance with the policy adopted by

the board of supervisors of said county for the payment of local revenue to said school board.

[fol. 161] IV

Be it further resolved by the Board of Supervisors of Prince Edward County, That the "Affirmation" signed by citizens and school patrons of the county is hereby received and directed to be filed with records of the Board and it is further resolved that the "Statement of Convictions and Purposes" adopted by the citizens of this county present at this meeting (being approximately 250 in number) be received by the board and it is directed that the same be filed with the records of the board.

And the clerk of this board is directed to prepare copies of the affirmation with a statement attached thereto showing the number of the citizens whose names are signed thereto together with copies of the "Statement of Convictions and Purposes" and that one copy of each be transmitted to the School Board of Prince Edward County, the Governor of Virginia, the superintendent of public instruction, the attorney general of Virginia, the State Board of Education, Representative J. H. Daniel and Senator J. D. Hagood, together with a copy of this resolution, and of the resolution this day adopted stating the policy and intention of this board with respect to the levy of taxes and appropriation of local revenue for school purposes.

V

Be it resolved by the Board of Supervisors of Prince Edward County, That the Governor be and he is hereby respectfully requested not to call a special session of the Legislature of Virginia for the purpose of presenting any legislative plan which would require, permit, or authorize under the laws of Virginia the teaching of white and Negro children together in the public schools of Prince Edward County.

Horace Adams, Clerk of the Board.

Declaration of Convictions

(Adopted May 3, 1956, by citizens of Prince Edward County, Va.)

The power of the Federal courts being once again invoked against the administrative officers of our public schools for the purpose of causing children of the white and Negro race to be taught together therein, we the people of Prince Edward County, Va., deem it appropriate that we should make known to all men our convictions and our purposes.

We first affirm our deep and abiding loyalty and devotion to our country and its institutions. We acknowledge the Constitution to be the supreme law of the land and the bulwark of our liberties, ever subject to the sovereign powers reserved by it to the States and to the people. We know that the liberties of all Americans of all races rests upon the Constitution and the division of powers ordained therein. We deem it the obligation of free men to preserve the powers reserved under the Constitution [fol. 162] to the States and to the people and to preserve the constitutional separation of the powers of government in the legislative, executive, and judicial branches separately.

We believe that the educational, social, and cultural welfare and growth of both the white and Negro races is best served by separation of the races in the public schools.

We believe the tranquility, harmony, progress, and advancement of the Negro and the white races, who must live together in Virginia and in Prince Edward County, is absolutely dependent upon the mutual good will and mutual respect of each race for the other.

We believe that a policy which undertakes to force the association of one race with the other against the will of either, by court decree under threat of fine or imprisonment, is destructive of mutual good will and respect, breeds resentment and animosities, and is injurious to the true interests of both races.

Education Parents' Duty

We believe that the molding of the minds and characters of our children is the sacred duty and the priceless natural right and obligation of parents.

Freedom of decision with respect to these considerations touching as they do the most intimate relations of the people of our community and the most cherished natural rights and duties of parenthood is absolutely essential to the maintenance, operation, management, and control of our public schools. We conceive this freedom to be among the sacred rights "retained by the people" under the ninth amendment of the Federal Constitution.

Among the reserved rights and powers of the States guaranteed to the State of Virginia under the 10th Amendment, is the power to maintain racially separate public schools. We do not perceive that the exercise of this power has ever been prohibited to the States by any provision of the Federal Constitution. We believe that this power can be prohibited to the States only by the States themselves. To concede the right of a Federal court to withdraw this power from the individual States is to concede that all rights and powers of the States and of the people are enjoyed at the sufferance of the judiciary and that the guaranties of the liberties of the people are no longer fixed in the Constitution itself.

We do not intend to speak disrespectfully. The gravity of the issues requires that we speak plainly. By its decision of May 17, 1954, and subsequent decisions the Supreme Court of the United States has flagrantly exceeded its lawful and intended authority, trespassed upon the rights of the people and dangerously encroached upon the reserved rights of the States.

Holding these convictions, it is not possible for us to submit the children of Prince Edward County to conditions which we most deeply and conscientiously believe to be pernicious. Nor can we as the heirs of liberty, pur- [fol. 163] chased at so great a sacrifice by those who have gone before, submit to this judicial breaking of the constitutional chains forged to restrain tyranny for all generations of Americans. We, therefore, pledge ourselves

firmly to use every honorable, legal and constitutional means at our command to oppose this assault upon the Constitution and upon the liberties of our people.

Prohibit Funds

Therefore, if courts refuse to recognize these most fundamental, intimate, and sacred rights and the profound necessity that they be respected, then we proclaim our resort to that first American tenet of liberty—that men should not be taxed against their will and without their consent for a purpose to which they are deeply and conscientiously opposed. We ask our board of supervisors as our legislative representatives to proceed at the appropriate time to enact and adopt whatever ordinances and resolutions may be required to prohibit the levying of any tax or the appropriation of any funds for the operation of racially mixed schools within Prince Edward County to the end that all public schools of the county may be closed upon the entry of a court order requiring the mixing of the races in any school of this county.

We further call upon our school board to make known to the district court the determination of the people of Prince Edward County here expressed. The issues are too profound and the consequences to our people too grave to leave any doubt of the impossibility of our compliance or of the resolute mind of our people. An order to mix the races in our schools can only result in the destruction of the opportunity for a public education for all children of this county.

Month-to-Month Basis

We also call upon the Governor of Virginia and all officials of the Commonwealth in control thereof to pay State revenue to Prince Edward County for school purposes in accordance with the policy adopted by the board of supervisors for the payment of local funds for school purposes, thus and thereby giving effect to the interposition resolution of the General Assembly of Virginia, adopted on February 1, 1956, fixing the policy of this Com-

monwealth, "to take all appropriate measures, honorably, legally, and constitutionally available to us, to resist this illegal encroachment upon our sovereign power."

It is with the most profound regret that we have been forced to set this course. The history of the people of Prince Edward County demonstrates their love and appreciation of the value of educational opportunity. We act with no animus toward any man or body of men. We do not act in oppression of the Negro people of this county. We propose, in every way that we can, to preserve every proper constitutional right of all the people of Prince Edward County. However deeply convinced as we are of the wrongness and imprudence of intimate racial integration, we cannot and will not place merely supposed rights, newly created by judicial mandate, above the conscience of our people and above rights and powers, which for [fol. 164] generations have been exercised honorably and constitutionally by the people of our county.

It is our earnest hope that other counties and the Commonwealth of Virginia will repudiate the spurious allurements of expediency and stratagem in order that Virginia may stand as she has always stood, dedicated to the protection of the rights of a free people against tyranny from any quarter. If we fail in this solemn obligation now our rights will be extinguished one by one.

[fol. 165]

APPENDIX B TO COMPLAINT IN INTERVENTION

Be It Ordained by the Board of Supervisors of Prince Edward County, Virginia that:

(1) Contributions made by any person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia to a nonprofit, nonsectarian private school located within said County of Prince Edward, Virginia may be deducted from the real and personal property taxes due the County of Prince Edward, Virginia by the person, association, firm, corporation or other taxpayer making such contribution for the year during which said contribution was made, subject to the limitations set forth in this ordinance.

(2) For the purpose of this Ordinance, the term "private school" shall mean only those nonprofit, nonsectarian private elementary and secondary schools either in operation during the year for which the tax deduction or credit is claimed or chartered to begin operation within the year succeeding that for which the tax deduction or credit is claimed, which schools are located in the County of Prince Edward, Virginia and which offer or will offer during the time herein set forth a course of systematic educational instruction of not less than one hundred eighty days duration per school year or the substantial equivalent thereof.

(3) No credit shall be allowed for any contribution made to any private school under the provisions of this ordinance unless the person, association, firm, corporation or other taxpayer seeking such credit files with the Treasurer of the County of Prince Edward, Virginia at the time his, her, or its taxes are due and payable. To wit: On or before December the fifth in the year in which the levy is made, a voucher, receipt or cancelled check showing the amount and date of the contribution and to whom made and his, her, or its affidavit setting forth the name and address of the school to which the contribution was made, the date thereof, the name and address of the person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia making such contribution, the amount thereof, and declaring that no scholarship, reduction in fees or charges, rebate or remission of charges or other benefit was granted such person, association, firm, corporation or other taxpayer or his or her children, or any child for which said person, association, firm, corporation or other taxpayer was the legal guardian or other person in loco parentis to such child directly or indirectly as a result of such contribution and declaring that no such refund, rebate, reduction in fees or charges or remission of charges or other benefit will be made to such person, association, firm, corporation or taxpayer on account of such contribution.

Upon the presentation of such affidavit and supporting evidence of payment to the Treasurer of the County of Prince Edward he shall deduct from the amount of taxes

due the County of Prince Edward by such person, firm, association, corporation or other taxpayer on account of real estate taxes or personal property taxes the amount of such contribution, in no event to exceed 25 per centum of the total taxes due the County of Prince Edward on real estate and personal property by such taxpayer. When such person, firm, association, corporation or other taxpayer shall have paid the balance remaining of such taxes due by such person, firm, association, corporation or taxpayer to the County of Prince Edward, Virginia he shall thereupon be discharged from any further liability for taxes assessed against his, her or its personal or real property by the County of Prince Edward, Virginia for the year in which such taxes were payable.

[fol. 166] (4) Upon denial of an application for refund, the Treasurer shall give notice to the applicant of his action within a reasonable time thereafter by mailing said notice to the Post Office address given in the application. Within 15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Treasurer shall file with the Board or its designated agent a petition for a review of this action. Such petition shall state the reasons for his objection to the action of the Treasurer and shall be heard by the Board at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(5) The Treasurer of Prince Edward County shall in no case be liable upon his bond or otherwise for any credit granted any person, firm, corporation, association or other taxpayer under this Ordinance provided the voucher, receipt or cancelled check and the affidavit required by this Ordinance executed by the person, firm, association or other taxpayer are filed with the Treasurer as herein required.

(6) It shall be unlawful and constitute a misdemeanor for any person falsely to claim a credit or seek to falsely claim a credit for a contribution as a credit against his taxes not in accordance with the provisions of this Ordinance. Any person violating this Ordinance shall be subject to a fine not exceeding $300.00 or confinement in jail not exceeding thirty days.

(7) If any part, section, portion or provision of this Ordinance or the application thereof to any person or circumstance be held invalid by a court of final resort, such holding shall not affect any part, section, portion, provision or application of this Ordinance which can be given effect without the part, section, portion, provision or application so held invalid; and to this end, the parts, sections, portions, provisions and applications hereof are declared severable.

(8) This Ordinance is passed pursuant to Chapter 191 of Acts of General Assembly of 1960, Section 58-19.1 of the Code of Virginia and Section 141 of the Constitution of Virginia as amended.

This Ordinance shall be full force and effective after its passage by the Board of Supervisors of Prince Edward County and the publication thereof as provided by law on the 6th day of August, 1960 and each and every year thereafter.

[fol. 167]

APPENDIX C TO COMPLAINT IN INTERVENTION

Be It Ordained that any parent, guardian or person in loco parentis to any child between six and twenty years of age, which child is a resident of Prince Edward County as hereinafter provided, is authorized to make application as hereinafter provided for a grant of funds to be used in furtherance of the elementary and secondary education of such child in private nonsectarian schools located within the County of Prince Edward, and in public schools located within the State of Virginia.

Section I

How Such Application Made, What it Shall Contain

A. The parent, guardian or person in loco parentis to any child shall make application for such grants upon forms provided by the Board of Supervisors of Prince Edward County, shall sign the same and make oath to the facts therein stated and shall file the same on or before the 1st day of September, 1960 or any succeeding year with the Board of Supervisors of Prince Edward County or with such person as the Board may designate to receive and examine such application.

B. The parent, guardian or person in loco parentis to such child in order to be eligible to receive a grant of funds under this ordinance shall, as a part of such application, make oaths to the following facts:

(a) The name of the parent, guardian or person in loco parentis making the application and the name, age and residence of each child on whose behalf the application is made.

(b) That the person signing the application is legally responsible for the care of each child for whose benefit the application is made.

(c) That each child in whose behalf the application is made has attained six years of age and has not attained the age of twenty years.

(d) That the said child is an actual bona fide resident of Prince Edward County and is educable.

(e) That each child on whose behalf the application is filed will be enrolled in either a private nonsectarian elementary or secondary school within the County of Prince Edward or in a public school within the State of Virginia wherein tuition is charged in at least the amount of the grant applied for.

(f) That said child is not detained or confined in any public institution.

(g) That said child is or will be enrolled during the school year for which the application is made in a course of systematic educational instruction or training of not less than one hundred eighty days duration or the substantial equivalent thereof, and shall give the name and location of said school, or the name of the person, or persons, offering such course of instruction or training and the place at which it will be offered.

(h) That said child has not graduated or completed the course of study offered at the high school level.

[fol. 168] (i) That the person making the application agrees to refund any grant made thereunder if said child for whom the grant is made fails to attend school at least one hundred fifty days per school year, unless the Board of Supervisors by resolution releases such obligation to refund on account of sickness of the child or other unavoidable or oppressive circumstances.

SECTION II

Minimum Amount of Grant; Discretion to Increase the Amount; How and to Whom Paid; Termination Thereof . . .

(1) The amount of each grant paid under this Ordinance shall be for a sum not less than One Hundred Dollars ($100.00) per year for each child and the amount thereof may be increased in the discretion of the Board of Supervisors by resolution adopted on or before the end of any fiscal year.

(2) Upon approval by the Board of Supervisors of the application therefor it shall by resolution make appropriation for the payment of each grant and shall authorize the Treasurer to make payment thereof upon warrants of the Board of Supervisors, as provided by law, for the payment of other claims against the County.

(3) Upon denial of an application or inability to act thereon because of the absence of necessary information, the Board shall give notice to the applicant of its action within a reasonable time thereafter by mailing said notice to the post office address given in the application. Within

15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Board shall file with the Board or its designated agent a petition for a review of its action. Such petition shall state the reasons for his objection to the action of the Board and shall be heard by the Board at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(4) The Board of Supervisors shall pay not more than half of any grant on or before the 15th day of October of the school year for which paid and the remainder at such intervals as it may deem proper, provided that the total amount thereof shall be paid not later than the 31st day of May of the school year for which the grant is made, and provided further that upon the violation of any condition set forth in the application therefor or upon the ascertainment that any false representation has been made in procuring said grant, the Board shall terminate the same and any balance thereof shall not be paid.

Section III

Defining Unlawful Acts in Violation of This Ordinance and Prescribing Penalty Therefor . . .

A. Any person who shall willfully make a false statement in any application for a grant under this Ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed three hundred dollars ($300.00) or by confinement in jail not exceeding 30 days.

[fol. 169] B. It shall be unlawful and constitute a misdemeanor for any person, firm, association or corporation

receiving a grant for educational purposes under this Ordinance to use the sum so received for any purpose other than for educational purposes in a private nonsectarian school located within the County of Prince Edward or in public schools located within the State of Virginia. Any person violating this section shall be subject to a fine not exceeding three hundred dollars ($300.00) or confinement in jail not exceeding 30 days.

Section IV

If Part Declared Unconstitutional, Other Parts to Remain in Force . . .

If any part, section, portion or provision of this Ordinance or the application thereof to any person or circumstance be held invalid by a court of final resort, such holding shall not affect any part, section, portion, provision or application of this Ordinance which can be given effect without the part, section, portion, provision or application so held invalid; and to this end, the parts, sections, portions, provisions and applications hereof are declared severable.

This Ordinance, comprised of Section I through Section IV is passed pursuant to Chapter 461 of the Acts of the General Assembly approved March 31, 1960, Code Section 22-115.37 and other sections of the Code of Virginia granting the powers herein exercised to the Board of Supervisors and pursuant to Section 141 of the Constitution of Virginia as amended.

This Ordinance shall be in full force and effective after its passage by the Board of Supervisors of Prince Edward County and the publication thereof as provided by law on the 6th day of August, 1960 and each and every year thereafter.

[fol. 170] Certificate of Service (omitted in printing).

[fol. 171] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 1333

EVA ALLEN, et al.

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al.

MOTION OF SCHOOL BOARD OF PRINCE EDWARD COUNTY TO DISMISS THE AMENDED SUPPLEMENTAL COMPLAINT PERMITTED TO BE FILED BY ORDER OF APRIL 24, 1961, ETC.—Filed May 1, 1961

I.

The defendant School Board of Prince Edward County moves that the Amended Supplemental Complaint permitted to be filed by Order of April 24, 1961, be dismissed for the following reasons:

1. Said Amended Supplemental Complaint alleges new causes of action different from that alleged in the original Complaint; the relief sought is alien to that sought in the original Complaint and it is sought against persons not parties to the original suit and who were foreign to the relief sought therein.

The original Complaint alleged racial discrimination in the admission, enrollment and education of Negro children in the public schools of the County and sought an injunction against the County School Board and Division Superintendent of Schools, restraining such alleged discriminatory practices. The Amended Supplemental Complaint alleges that no public schools are being maintained in Prince Edward County. It alleges that the Board of

Supervisors of the County have not made and do not intend to make any levy or appropriation for the operation of public schools in the County; that it has by ordinance provided for a County tax credit to be given for contributions made to certain nonprofit and nonsectarian private schools; that by another ordinance it has provided for scholarship grants from County funds in aid of any child, resident in the County, desiring to attend a nonsectarian private school or desiring to attend a public school in another locality; and that all or most of said [fol. 172] grants in aid have been paid to or in reimbursement for sums paid to the Prince Edward School Foundation which was organized to provide educational opportunities for white children only and for the education of white children residing in the County.

Said Amended Supplemental Complaint further alleges that the State Board of Education and the Superintendent of Public Instruction have not acted to discharge an alleged obligation of Virginia to operate schools in Prince Edward County; that said State Board and Superintendent, from funds which would otherwise have been available for the operation of public schools in the County, have approved tuition grants to more than a thousand white children to attend the schools operated by said Foundation.

Said Amended Supplemental Complaint finally alleges that the School Board of Prince Edward County is considering and contemplating the conveyance, lease or transfer of public schools or public school properties of the County.

Upon these allegations said Amended Supplemental Complaint seeks by mandatory injunction to compel the operation of public schools in Prince Edward County; to enjoin all the defendants from expending any public funds in support of any private school which excludes Negroes or from expending any public funds in aid of the attendance of any child at any such school; to enjoin the giving of any tax credit for contributions to any such schools; and finally to enjoin the sale or lease of the public schools and facilities in said County.

2. On the face of said Amended Supplemental Complaint, when read with the Order of this Court of April 22, 1960, it appears that the alleged actions complained of do not and cannot render said Order ineffective or unenforceable or circumvent or frustrate the enforcement thereof.

[fol. 173] 3. The Amended Supplemental Complaint alleges no cause of action over which this Court should entertain jurisdiction because it calls for construction of provisions of the Constitution of Virginia, of her statutes, and of ordinances of the Board of Supervisors of the County of Prince Edward relating to matters of primary importance involving relations between Nation and State. The Supreme Court of Appeals of Virginia has not construed these constitutional provisions, statutes, and ordinances. Such construction will be binding on this Court and may eliminate alleged constitutional issues presented in the Amended Supplemental Complaint. A proper regard for our Federal system requires that complainants present these questions of State Constitution, laws and County ordinances to the proper State courts for determination.

4. The Amended Supplemental Complaint prays for reliefs which this Court has no jurisdiction to grant.

5. The Amended Supplemental Complaint does not allege that any statute or ordinance is unconstitutional or that any statute or ordinance is being administered in an unconstitutional manner. It attacks them because of the alleged motive or purpose of the individuals composing legislative bodies. A statute or ordinance otherwise constitutional which is administered in a constitutional manner does not become unconstitutional because of any motive or purpose of legislators.

II.

If the preceding motion be overruled, the defendant School Board of Prince Edward County moves that Section I, II, III, and IV of the Amended Supplemental Complaint and Paragraphs (a), (b), (c), and (d) of the prayers

thereof be dismissed as to it because this defendant has no authority or power to levy any taxes or to appropriate any funds or to provide for any tax credit or to give any scholarship grant in aid or any tuition grant. Indeed its [fol. 174] power in these regards is confined to the making of budgetary recommendations to the County Board of Supervisors, and said Amended Supplemental Complaint expressly admits it has performed its duty in connection with that power.

III.

If the foregoing motions be overruled, the defendant School Board of Prince Edward County moves that Paragraphs (b), (c), and (d) of the prayers of the Amended Supplemental Complaint be dismissed because the allegations of said Complaint are confined to Prince Edward County and these prayers seek injunctions not only in connection with schools in Prince Edward County but also concerning funds and schools entirely foreign to Prince Edward County.

IV.

Should the motion made in Section I hereof be overruled, the defendant School Board of Prince Edward County moves that Section V of the Amended Supplemental Complaint and Paragraph (e) of the prayers thereof be dismissed:

Because no sale of school property exceeding $500.00 in value may be made under § 22-161 of the Code of Virginia, as amended, without order approving and ratifying the same being obtained from the Circuit Court of Prince Edward County, Virginia, and any questions concerning any sale pursuant to that section must at the least be first raised before that Court.

Because §§ 22-164.1 and 22-164.2 of said Code do not relate to or affect the conveyance, lease, or transfer of the public schools and public school property of the County.

Because no conveyance, lease, or transfer of school property can be had pursuant to §§ 22-161.1 to 22-161.5, inclusive, of said Code unless 10 per centum of the voters voting in

the last preceding presidential election in the County and all petition the Circuit Court of Prince Edward County for [fol. 175] entry of an order for an election by the people of the County to determine whether the property or properties specified are or are not needed for public purposes and not until favorable outcome of that vote can sale be made. Said Amended Supplemental Complaint does not allege that any of these acts which are conditions precedent to sale have been taken or are contemplated.

County School Board of Prince Edward County, Virginia, By Collins Denny, Jr., Of Counsel.

Denny, Valentine & Davenport, Collins Denny, Jr., John F. Kay, Jr., 1300 Travelers Building, Richmond 19, Virginia.

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for said Board.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 176] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al.

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, etc., et al.

OPINION DENYING WITHOUT PREJUDICE MOTIONS TO DISMISS AMENDED SUPPLEMENTAL COMPLAINT, ETC.—June 14, 1961

This case came on to be heard upon the motions to dismiss the amended supplemental complaint, upon the written briefs and argument of counsel.

The principal contentions of the various defendants in support of their motions to dismiss are summarized as follows:

The amended supplemental complaint is a suit against the Commonwealth of Virginia in contravention of the Eleventh Amendment to the Constitution of the United States.

The Doctrine of Abstention should be invoked.

[fol. 177] The injunctive relief requested can not be granted except by a district court of three judges.

The amended supplemental complaint created a new cause of action.

The paramount question raised by the amended supplemental complaint is, whether or not the defendants, individually or in concert with each other, are deliberately circumventing or attempting to circumvent or frustrate the order of this Court.

On that question the plaintiffs are entitled to be heard.

Therefore, the motions to dismiss are herewith denied, without prejudice to the rights of the defendants or any of them to renew their motions upon the conclusion of the hearing if they are then so advised.

If during the course of the hearing the Court is of the opinion that it will be necessary to construe and/or interpret certain sections of the Constitution of Virginia or the [fol. 178] statutes made pursuant thereto, pertaining to the maintenance of a system of free public schools, not heretofore passed upon by the Supreme Court of Appeals of Virginia, further proceedings herein will be stayed for a reasonable period to permit the parties or any of them to institute appropriate action in the state courts.

Likewise, if a district court of three judges is deemed necessary pursuant to Title 28, Section 2284, United States Code, further proceedings herein will be stayed until such a court can be convened.

The defendants are granted twenty days from the date of this opinion to file their answer and/or other responsive pleadings to the amended supplemental complaint.

July 24, 1961, at 10:00 o'clock A.M., E.D.S.T., is fixed as the date for the hearing on the merits. A formal pre-trial of the issues to be heard will be scheduled for July 10, 1961, at 4:00 o'clock P.M., E.D.S.T., if requested by any of the parties, otherwise counsel for all parties shall ten days before the trial date exchange with each other copies of all [fol. 179] exhibits intended to be introduced as evidence. Formal proof of authenticity of such document will be deemed to be waived unless objected to in writing three days prior to trial, in which event the offering party must be prepared to offer the necessary formal proof. All other questions of admissibility such as relevancy, etc., will be ruled upon when and as the exhibit is offered in evidence.

Counsel for all parties shall also within the same time limits exchange lists showing the names and addresses of all witnesses they intend to call. The name and address of later discovered witnesses must be exchanged when and as discovered, otherwise witnesses presented on the date of the trial will not be permitted to testify except by leave of Court for good cause shown.

Counsel for the plaintiffs should prepare an order in accord with the foregoing, submit same to counsel for defendants for approval as to form, and it will be accordingly entered effective this date.

Oren R. Lewis, United States District Judge.

Richmond, Virginia, June 14, 1961.

[fol. 180] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al.,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, etc., et al.

MEMORANDUM OPINION—June 14, 1961

The United States seeks to intervene as a party plaintiff in the above captioned matter. A better understanding of the question now before the Court necessitates a brief history of the main action.

In compliance with the decision rendered in Brown v. Board of Education, 349 U.S. 294 (1955), an order was entered in this suit under date of November 26, 1958, providing, among other things, that the defendants proceed promptly with the formulation of a plan to comply with the order of this Court heretofore entered enjoining them from discriminating against the plaintiffs in admission to the public schools of the County solely on account of race. [fol. 181] Said defendants were further directed to report to the Court on or before January 1, 1959, the progress made in the formulation of such plan and were further directed to comply with the terms of the injunction heretofore entered commencing with the opening of the school year 1965.

The Court of Appeals for the Fourth Circuit under date of May 5, 1959, reversed this Court and remanded the case, with directions to issue an order in accordance with that opinion, which provided, among other things, that the de-

fendants be enjoined from any action that regulates or affects on the basis of color the enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County, and to take immediate steps in this regard to the end that the applications be considered so as to permit the entrance of qualified persons into the white schools in the school term beginning September 1959. No decree was entered pursuant to the mandate of the Court of Appeals until the petitioners presented an appropriate order for entry therein on April 22, 1960, pertinent portions [fol. 182] of said order being:

> "The defendants are restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.
>
> "That the defendants make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this end at the earliest practical day."

The Court and all counsel of record had knowledge of the fact that the public schools of Prince Edward County were closed prior to the entry of the said order.

Under date of July 8, 1960, counsel for the plaintiffs filed a motion to intervene additional plaintiffs; a motion for leave to file a supplemental complaint and to add additional defendants; to all of which motions the defendants objected. On September 16, 1960, the said motions were granted. By consent decree, the time for the filing of responsive pleadings to the supplemental complaint was extended to October 24, 1960.

[fol. 183] The defendants filed motions to dismiss the supplemental complaint. Prior to the hearing of said motions, the plaintiffs on January 13, 1961, filed a motion for leave to amend their supplemental complaint and to

add the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County, as additional defendants.

Upon consideration of the said motions the Court under date of April 24, 1961, granted plaintiffs leave to amend their supplemental complaint and to add the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County, as additional defendants. The order fixed May 1, 1961, as the last date for the plaintiffs to offer any further amendments to their pleadings and as the last date for the defendants to file any motions in response thereto. The hearing of the motions thus filed was set for May 8, 1961.

Under date of April 26, 1961, the United States, by Robert F. Kennedy, Attorney General, and Joseph S. Bambacus, United States Attorney for the Eastern District of Virginia, moved the Court for leave to intervene as a [fol. 184] plaintiff in this action and to file a complaint in intervention, and to add as parties defendant the Prince Edward School Foundation, a corporation, the Commonwealth of Virginia, and Sydney C. Day, Jr., Comptroller of Virginia.

The United States, in support of its motion to intervene, alleges that intervention

> "is necessary in order to prevent the circumvention and nullification of the prior orders of this Court and to safeguard the due administration of justice and the integrity of the judicial processes of the United States.
>
> "The claim of the United States, as set forth in the complaint in intervention, involves questions of both law and fact in common with those raised by the amended supplemental complaint filed by the plaintiffs herein."

The motion was made under and pursuant to Sections 309 and 316, Title 5, United States Code, and Rule 24 of the Rules of Civil Procedure. The United States requested a hearing, on its motion to intervene, on May 8, 1961. The motion was then heard.

All of the defendants to this suit and the additional parties sought to be made defendants objected to the in-

tervention of the United States as a party plaintiff. The plaintiffs supported the Government's position. The mat-
[fol. 185] ter was fully and ably argued by counsel for all parties and the written briefs have been carefully considered by the Court.

Rule 24 of the Rules of Civil Procedure provides for intervention of right and permissive intervention.

> Rule 24. (a) "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

It is therefore necessary to first determine whether or not the United States, as a matter of right, may intervene in this suit as a party plaintiff. If it has such a right, its application therefor must be "timely" filed; the rule specifically so provides. The able Assistant Attorney General of the United States, both in his oral argument and in his written brief, totally ignored this requirement of the rule. The Government offered no excuse or extenuating circum-
[fol. 186] stances justifying a delay of more than a year in the filing of the Government's motion in intervention.[1]

In view of the necessity of scheduling an early hearing on the merits of the plaintiff's amended supplemental complaint and the unexplained delay on the part of the Government in filing its motion in intervention, there is a serious question in the Court's mind as to whether or not the motion was "timely" filed.

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[1] The order of this Court which they allege as being circumvented, was entered April 22, 1960. The Government's motion in intervention was filed April 26, 1961.

The Government does not contend that it has a statutory right to intervene in this suit. However, the Court's attention has been called to the fact that several bills have been introduced in the Congress of the United States and some are now pending, specifically granting unto the Attorney General of the United States the right to intervene in suits of this type as a party plaintiff. None of these bills, however, have been enacted into law. Thus to grant intervention in this case, in the absence of statutory authority, [fol. 187] would appear to be contrary to the intent of Congress. This, however, the Court need not decide, because the Attorney General relies primarily on Section (2) of Rule 24 (a).

He contends:

> "The interest of the United States, which is unique, is not represented by any of the existing parties. The plaintiffs seek to secure their constitutional rights, but the United States seeks to preserve its judicial processes against impairment by obstruction or circumvention. These clearly are distinct interests. Moreover, the due administration of justice is a sovereign interest that cannot properly be entrusted for safeguarding to private parties. The representation of the interest of the United States by the plaintiffs is plainly inadequate."

The Attorney General further contends:

> "The United States, by its complaint in intervention, has joined the State of Virginia in order to secure complete relief in this action, in which the United States contends that the State is circumventing this Court's order by action which is unlawful in that it denies to the residents of Prince Edward County the equal protection of the laws. But the State of Virginia can be made a defendant only by the United States, [fol. 188] since the Eleventh Amendment of the United States Constitution bars the plaintiffs from suing a State without its consent."

In support of this contention, the Attorney General seeks to parallel the situation in Prince Edward County with the former situation in Little Rock and New Orleans. The facts in these cases do not justify such a comparison. In the latter cases, open defiance of Federal Court orders was obvious. In Virginia this complex problem has been and is being solved in a lawful and proper manner through the courts. There has been no known defiance of this Court's orders by either the State of Virginia or the County of Prince Edward. Even under the situation then existing in Little Rock and New Orleans, the Attorney General, insofar as this Court knows, did not move to intervene as a party plaintiff for any purpose. To the contrary, the Government's participation in those cases was at the Court's invitation as amicus curiae.[2]

[fol. 189] The precise question before this Court, in the case under consideration, is whether or not the defendants, or any of them, are violating or circumventing its orders. To find the defendants guilty of so doing without a hearing would be a clear violation of the defendants' constitutional rights. That, this Court will not do. The United States has no right to intervene as a party plaintiff in this case on that ground until this Court has first determined that its orders are in fact being violated or circumvented.

The Attorney General further argues, however, that the plaintiffs are unable to represent adequately the interest of the United States because the plaintiffs can not make the Commonwealth of Virginia a party defendant by virtue of the Eleventh Amendment to the United States Constitution.[3] Surely, that is not the "interest" referred to in the statute. If the United States has a cause of action against the Commonwealth of Virginia, in this or any other type

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[2] A party plaintiff assumes the role of a party litigant. It is allowed to file pleadings, offer evidence, file briefs and seek relief. It has a right to reasonably control its side of the case; amicus curiae is technically "a friend of the Court", as distinguished from an advocate. It arises only via an ex parte order of the Court and fully advises the Court on the law in order that justice may be attained.

[3] See United States v. Texas, 143 U.S. 621; United States v. California, 332 U.S. 19.

of suit, the right to maintain that cause of action is not predicated upon the right to intervene as a party plaintiff [fol. 190] in a suit instituted by private plaintiffs seeking to secure their constitutional rights.

The Attorney General cites numerous cases in support of his contention that the United States by virtue of its national sovereignty has a sufficient general interest in this case to be permitted to intervene of right. Suffice it to say that none of the cited cases are sufficiently in point with the facts in this case to sustain his contention.

> "It is well settled that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights." See Jewell Ridge Coal Corp. v. Local No. 6167, etc., 3 FRD 251. See also Radford Iron Co. Inc. v. Appalachian Electric Power Co., 62 F. 2d 940.

The Attorney General next contends Rule 24 must be considered in connection with Title 5, Sections 309 and 316,* U.S.C.A. With this we do not disagree. Clearly, [fol. 191] these statutes give very broad authority to the Attorney General to institute and conduct litigation in

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* Section 309. "Conduct and argument of cases by Attorney General and Solicitor General. Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so."

Section 316. "Interest of United States in pending suits. The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States."

order to establish and safeguard Government rights and properties.

In our view of the matter, having reached the opinion that the United States does not have such an "interest" in the instant case as is required by Rule 24(a), these statutes are not applicable, for they likewise require the United States to have such an "interest".

Therefore this Court is of the opinion that the United States has no absolute right of intervention in this suit under Rule 24 (a).

The Attorney General further argues, however, that if the Court be of such opinion, the United States, in any [fol. 192] event, ought to be permitted to intervene under Rule 24 (b) Permissive Intervention, which reads as follows:

> "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The granting of the motion under this section lies within the sound discretion of the Court and in so determining the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In the judicial exercise of this discretion it is deemed proper that the allegations of the proposed complaint of intervention be carefully examined and compared with the allegations of the amended supplemental complaint now pending before this Court.

[fol. 193] The material allegations of the complaint in intervention are summarized as follows:

Section 129 of the Constitution of Virginia requires that the General Assembly establish and maintain a system of public free schools throughout the state; prior to June 1959, free public schools were being maintained in Prince Edward County, educating approximately 1700 Negro and 1400 white pupils; segregated schools were then being maintained; under date of May 17, 1954, the Supreme Court of the United States held that state operation of racially segregated schools in Prince Edward County was unconstitutional; in July 1954, the Supervisors of Prince Edward County expressed opposition to the operation of racially unsegregated public schools; in July 1955, this Court entered an order requiring that the public schools in Prince Edward County be racially desegregated with all deliberate speed; in May 1956, the Board of Supervisors of Prince Edward County, in response to a request of 4,000 white citizens, adopted a resolution declaring it to be the policy of the Board that no county tax levy should be made for operation of public schools on a non-segregated basis; [fol. 194] on May 5, 1959, the Court of Appeals for the Fourth Circuit directed the entry of an order requiring that the public schools of Prince Edward County be operated on a racially non-discriminatory basis, commencing in the fall of 1959; Articles of Incorporation were executed on May 26, 1959, for the creation of Prince Edward School Foundation for the purpose of operating elementary and high schools in Prince Edward County for the education of children of the white race exclusively; on June 2, 1959, the Board of Supervisors of Prince Edward County did not levy taxes for the operation of public schools for the school year 1959-60; public schools in Prince Edward County were not opened for the fall semester of 1959 and have not been opened since that date; the Prince Edward School Foundation began operating in September 1959; approximately 1400 white children attended; no tuition or fees were charged for educating these students; the Foundation obtained its funds through contributions for the school year 1959-60; on April 22, 1960, this Court entered an

order enjoining the defendants from any action that regulated or affected the enrollment or education of Negro children on the basis of race or color to the public high [fol. 195] school of Prince Edward County and further requiring the defendant to make plans for the admission of pupils to the elementary schools of the County without regard to race or color at the earliest practical date; in June 1960, the Board of Supervisors adopted a budget including funds for educational purposes, but without providing funds to permit operation of public schools; in July 1960, the Board of Supervisors adopted an ordinance requiring the County Treasurer to allow a certain credit against real estate and personal property taxes on account of any contributions made to a certain private school located in Prince Edward County; the Board of Supervisors on the same day adopted a tuition grant plan of not less than $100.00 per year per child who was enrolled in a private non-sectarian school within the County or in a public school within the state; that the only non-sectarian private school within the County was the Prince Edward School Foundation; $58,000.00 in tax credits have been granted on account of contributions to the Prince Edward School Foundation; the Foundation for the school year 1960-61 charged a $240.00 tuition for elementary schools and a $265.00 tuition for high schools; tuition grants from [fol. 196] the state and county amount of $225.00 for elementary students and $250.00 for high school students; in December 1960, a number of Negro residents petitioned the Board of Supervisors to reopen the public schools of the County; this request was denied; since June 1959, the defendants have failed and refused to maintain free public schools in Prince Edward County; the purpose and effect has been and is to prevent the operation of public schools in compliance with the orders of this Court on a racially non-discriminatory basis; since June 1959, the defendants have maintained the schools of the Prince Edward School Foundation for the education of white children residing in Prince Edward County; since that date no schools have been operated in Prince Edward County for Negro children; a system of free public schools is being maintained elsewhere in the State of Virginia; the failure and

refusal of all of the defendants, including the State, to maintain free public schools in Prince Edward County, while such a system is being maintained in the rest of the State, denies to the Negro residents of the County, rights secured under the Fourteenth Amendment to the Constitution.

[fol. 197] The complaint in intervention prays that this Court enter an order enjoining the defendants from failing or refusing to maintain free public schools in Prince Edward County; for an order enjoining the defendants from paying tuition grants to students attending Prince Edward School Foundation so long as public schools are closed; for an order enjoining certain defendants from allowing any credit to taxpayers on account of contributions to the Prince Edward School Foundation, during the time public schools are closed in Prince Edward County; for an order enjoining all the defendants, including the State of Virginia, from the payment of any funds of the State for the maintenance of public schools anywhere in Virginia during such period as public schools are closed in Prince Edward County.

The allegations of the amended supplemental complaint are substantially the same except that paragraph 16 of the amended supplemental complaint alleges that the County School Board of Prince Edward County is considering and contemplating the conveyance, lease or transfer of the public schools and public school property to some private corporation, etc.

[fol. 198] The amended supplemental complaint does not, however, seek to make Prince Edward School Foundation, the State of Virginia, or its Comptroller General parties defendant.

The prayers of the amended supplemental complaint request this Court to enter an order enjoining the present defendants (not the State of Virginia) from refusing to maintain free public schools in Prince Edward County; from expending public funds for the direct or indirect support of any private school which excludes the infant plaintiffs and others similarly situated by reason of race; from crediting any taxpayer with money paid or contributed to any private school which excludes the infant plaintiffs and

others similarly situated for the reason of race; from conveying, leasing or otherwise transferring title, possession or operation of public schools and facilities incidental thereto to any private corporation.

It is apparent from a comparison of the complaint in intervention with the amended supplemental complaint that the material difference therein is that the United States in its complaint in intervention seeks to make the Prince Edward School Foundation, the State of Virginia and its Comptroller General parties defendant and to have this Court enter an order enjoining the State of Virginia [fol. 199] from failing or refusing to maintain free public schools in Prince Edward County and enjoining the State from the expenditure of any of its funds for the maintenance of free public schools throughout the rest of Virginia so long as the free public schools of Prince Edward County remain closed. Such relief, if granted, would be unnecessarily punitive, in that it would require the closing of most, if not all, of the free public schools in Virginia. Whether the means, if legal, justifies the end is questionable, to say the least.

Although the Assistant Attorney General, in his argument before the Court, stated that "it was not the intent of the Government to force the closing of the public schools in Virginia; to the contrary, the purpose of the Government was to force the opening of the schools in Prince Edward County", he refused to delete this prayer from the complaint in intervention, stating "he did not have the authority to so do". Therefore this Court can only conclude, if the Government be permitted to intervene as a party plaintiff, it would urge this Court to enter an order that could jeopardize the education of several hundred thousand Virginia children who have no responsibility whatsoever for the closing of public schools in Prince Edward County.

[fol. 200] If this Court were to entertain the complaint in intervention in its present form, it would be necessary for the Court to construe and interpret certain sections of the Constitution of Virginia and laws adopted pursuant thereto pertaining to the maintenance of a system of free public schools in the State of Virginia. Abstinence in state affairs

when not in conflict with the United States Constitution[5] has long been the federal policy. "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments should at all times actuate the federal courts,' Matthews v. Rodgers, 284 U.S. 521, 525, as their 'contribution in furthering the harmonious relation between state and federal authority.' Railroad Comm'r v. Pullman Co., 312 U.S. 496." Harrison [fol. 201] v. NAACP, 360 U.S. 167.

Further, since the complaint in intervention seeks to make the Commonwealth of Virginia a party defendant, thereby making the suit a direct action against the State, it would be necessary, if an injunction were to issue against the State, to convene a three-judge District Court as provided for in Title 28, Section 2281 of the United States Code. These are not questions of law or fact in common with the main action. To the contrary, they are new and independent assertions, which admittedly are not alleged in the amended supplemental complaint. A determination of these questions, whether heard by a three-judge court or by the Supreme Court of Appeals of Virginia, by virtue of the Doctrine of Abstention, will materially delay the adjudication of the private constitutional rights asserted by the individual plaintiffs in the main action. Further delay would inevitably occur as a result of an appeal to the Supreme Court of the United States, during which interim the "status quo" would be maintained in Prince Edward County.

The Attorney General cites many of the same authorities and arguments in support of permissive intervention as [fol. 202] were asserted in support of intervention of right. It is unnecessary to comment further on most of them. However, the Attorney General insists that the Department

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[5] This Court knows of no provision of the United States Constitution which provides that the states shall provide a system of free public education and none has been cited.

of Justice is better equipped than the private plaintiffs to represent and defend the national interest. He states:

> "It has an experienced legal staff which is conversant with the legal issues involved herein. It also has the investigative facilities of the Federal Bureau of Investigation and the services of the United States Attorney to attend upon the Court. Thus, the public interest in assuring that all the implications of the issues are brought to the attention of the Court warrants the Government's intervention here."

This is undoubtedly true, but whether or not the Department of Justice should use its vast resources as a party litigant in a suit it admits was instituted by private citizens to secure their constitutional rights, is a question this Court need not decide.

The Court being of the opinion the granting of intervention will unduly delay and prejudice the adjudication of the rights of the original parties, the motion of the United States to intervene as a party plaintiff and to add as parties defendant the Prince Edward School Foundation, the Commonwealth of Virginia, and Sydney C. Day, Jr., Comptroller of Virginia, is denied.

[fol. 203] Counsel for the defendants should prepare an appropriate order, in accord with this opinion, submit it to counsel for plaintiffs and counsel for the United States for approval as to form, and present the same for entry herein.

Oren R. Lewis, United States District Judge.

June 14, 1961

[fol. 204] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

MOTION OF COUNTY SCHOOL BOARD FOR LEAVE TO FILE REPORT—Filed June 15, 1961

Defendant, County School Board of Prince Edward County, Virginia, moves the Court for an order permitting the filing of the attached report.

While said defendant does not believe it is required by any order or provision of law to bring to the attention of the Court the matter set forth in said report, it does believe that it is proper for it so to do.

Collins Denny Jr., of Counsel for Defendant, County School Board of Prince Edward County, Virginia.

Denny, Valentine & Davenport, Collins Denny, Jr., John F. Kay, Jr., 1300 Travelers Building, Richmond 19, Virginia.

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for County School Board of Prince Edward County, Virginia.

NOTICE

To:

Robert L. Carter, Esquire, 20 West 40th Street, New York 18, New York.

[fol. 205] S. W. Tucker, Esquire, 111 East Atlantic Street, Emporia, Virginia, Counsel for Plaintiffs.

Honorable Frederick T. Gray, Attorney General of Virginia, State Library Building, Richmond, Virginia.

Honorable J. Segar Gravatt, Attorney at Law, Blackstone, Virginia, Counsel for other Defendants.

Please take notice that counsel for the County School Board of Prince Edward County, Virginia, will bring the foregoing motion on for hearing before this Court at its courtroom in the United States Post Office Building, Richmond, Virginia, on the 26th day of June, 1961, at 10:00 o'clock a.m. of that day or as soon thereafter as counsel can be heard.

Collins Denny, Jr., of Counsel for Defendant, County School Board of Prince Edward County, Virginia.

CERTIFICATE

I certify that copies of the foregoing Motion together with copies of report and letter thereto attached were served upon other parties hereto by mailing copy thereof on June 15th, 1961, to Robert L. Carter, Esquire and S. W. Tucker, Esquire, Counsel for Plaintiffs and to Honorable Frederick T. Gray, Attorney General of Virginia and Honorable J. Segar Gravatt, Counsel for other Defendants at their respective addresses listed above.

Collins Denny, Jr.

[fol. 206] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

REPORT FROM SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA—Filed July 24, 1961

To the Honorable Oren R. Lewis, Judge of said Court:

The defendant, School Board of Prince Edward County, Virginia, desires to make report to the Court of a certain action recently taken by it. It does so not because it believes the current order of Court so requires or that any provision of law so requires. It does so as a matter of courtesy.

The Board has been anxious to do anything it might properly do to aid the cause of education in the County. It learned a few weeks ago, with the greatest interest, of a suggestion that the Virginia Teachers Association conduct a "crash" program this summer for those children in the County who have not been attending school. It is probable that that Association will command the confidence of the parents of these children and those who have been influencing them and that it may thus succeed in bringing some educational opportunity to these children.

The buildings and equipment owned by this Board, erected with the intent that they would be used for the benefit of all the children of the County, have now for two years stood idle. The School Board believes it is proper

[fol. 207] and permissible that it offer those facilities to the Virginia Teachers Association to assist it in its purpose. It has accordingly, after first consulting with its counsel, addressed to Dr. J. Rupert Picott a letter, a copy of which is attached hereto.

Respectfully submitted,

School Board of Prince Edward County, Virginia,
By Collins Denny, Jr., of Counsel.

[fol. 208]

PRINCE EDWARD COUNTY PUBLIC SCHOOLS

Office of the Division Superintendent

Farmville, Virginia

June 14, 1961

Dr. J. Rupert Picott
Executive Secretary
Virginia Teachers Association
316 East Clay Street
Richmond 19, Virginia

Dear Dr. Picott:

The School Board of Prince Edward County, along with the public generally throughout the County, has been deeply distressed that a substantial segment of the children of the County have now for two years been without schools. The members of the School Board have noted with the keenest interest that the Virginia Teachers Association proposes this summer to attempt to operate a "crash remedial program" for so many of these children as will avail themselves of it. We trust this program will meet with great success. Supported as it will be by your organization, it should elicit the confidence of those whom it is designed to aid.

The School Board believes that it should do all it can to help. We have, as you know, the buildings formerly used as public schools. They stand idle. I am directed by the Board to offer such of them as may be helpful to your organ-

ization for the furtherance of this program without cost to your Association. The Board, of course, does not desire or seek in any way to influence your program; since it is responsible for the upkeep and repair of the physical properties, it would at the expense of the Board maintain custodial and janitorial supervision and provide all needed utility services and attempt to be of aid in any other respects you might desire. The Board still owns some school buses, and perhaps a plan for making them available could also be perfected.

If this proposal will be of assistance to you and you desire to avail yourself of it, representatives of the Board will be happy to meet with representatives of your Association to perfect the details. I would think that the sooner we get started the better. An early conference can be arranged by communicating either with me, Mr. T. J. McIlwaine, Division Superintendent of Schools, Farmville, Virginia, or our counsel, Mr. Collins Denny, Jr., Travelers Building, Richmond, Virginia.

Very truly yours,

W. Edward Smith, Chairman, Prince Edward County School Board.

[fol. 209] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT RICHMOND
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

ORDER DENYING MOTION OF UNITED STATES TO INTERVENE AS PARTY PLAINTIFF AND TO ADD PARTIES DEFENDANT—July 5, 1961

This cause came on to be heard upon the motion of the United States to intervene as a plaintiff and to add defendants, and upon the written briefs and argument of counsel; upon a consideration of all of which, for the reasons stated in an opinion of the Court filed in this case on June 14, 1961, it is

Ordered that the motion of the United States to intervene as a party plaintiff and to add as parties defendant the Prince Edward School Foundation, the Commonwealth of Virginia, and Sidney C. Day, Jr., Comptroller of Virginia, is denied.

Oren R. Lewis, United States District Judge, Richmond, Virginia, July 5, 1961.

We ask for this:

Collins Denny Jr., Of Counsel for the School Board and Division Superintendent of Schools of Prince Edward County.

[fol. 210] F. N. Watkins, Com. Atty. Prince Ed. County, Va.

J. Segar Gravatt, Of Counsel for the Board of Supervisors of Prince Edward County.

Frederick T. Gray, Of Counsel for the Superintendent of Public Instruction and the State Board of Education.

Seen:

S. W. Tucker, Of Counsel for Plaintiffs.

H. John Barrett, Of Counsel for the United States.

[fol. 211] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al., Defendants.

ORDER DENYING MOTIONS TO DISMISS SUPPLEMENTAL COMPLAINT, ETC.—July 7, 1961

This cause came on to be heard upon the motions to dismiss the amended supplemental complaint and upon the written briefs and argument of counsel; upon a consideration of all of which, for the reasons stated in an opinion of the Court filed in this case on June 14, 1961, it is

Ordered that the motions to dismiss are denied, without prejudice to the rights of the defendants or any of them to renew their motions upon the conclusion of the hearing if they are then so advised; and it is further

Ordered that the defendants shall file their answer and/or other responsive pleadings to the amended supplemental

complaint within twenty days from June 14, 1961, and that pre-trial procedures as provided and scheduled in said memorandum be observed by counsel for all parties, and that this cause be heard on its merits on July 24, 1961, at 10:00 o'clock A. M., E. D. S. T.

The Court, being requested to do so, notes the retirement of Oliver W. Hill, Esquire, Spottswood W. Robinson, III, Esquire, and Frank D. Reeves, Esquire, from this case as counsel for the plaintiffs.

Oren R. Lewis, United States District Judge, July 7, 1961.

[fol. 212] We ask for this:

S. W. Tucker, Of Counsel for Plaintiffs.

Seen and objected to:

Collins Denny Jr., Of Counsel for the County School Board of Prince Edward County and Division Superintendent of Schools.

Frank N. Watkins, Commonwealth Attorney.

J. Segar Gravatt, Of Counsel for the Board of Supervisors of Prince Edward County and J. W. Wilson, Treasurer.

Frederick T. Gray, Of Counsel for State Board of Education and Superintendent of Public Instruction.

[fol. 213]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al.

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al.

July 24-27, 1961

TRANSCRIPT OF TRIAL PROCEEDINGS

Before Honorable Oren R. Lewis, District Judge.

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[fol. 213a] MARY R. CHEATHAM, called as a witness by the plaintiffs and being first duly sworn, testified as follows:

Direct examination.

By Mr. Carter:

Q. Is this Miss or Mrs. Cheatham?
A. Mrs.
Q. Mrs. Cheatham, where do you live?
A. In Farmville.
Q. What do you do?
A. I am the agent for the Board of Supervisors of Prince Edward County.
Q. As agent for the Board of Supervisors of Prince Edward County, what do you do?
A. I accept, process, and generally am in charge of the [fol. 213b] applications for educational grants for the children of Prince Edward County.

Q. That is, the applications for educational grants that are paid by the Board of Supervisors pursuant to the ordinance which has been introduced?

A. Yes, sir.

Q. Now, do all applications come through your office?

A. All county applications come through my office.

Q. All applications for funds of the Board of Supervisors come through your office?

A. Yes, sir.

Q. I will show you Plaintiff's Exhibit No. 18 and ask you if that is the application?

A. Yes, sir.

Q. Mrs. Cheatham, how many applications were received through your office during the year of '59-60?

A. I will have to make an estimate on that. I do not have the exact figure in my head. I will be able to give that to you tomorrow morning. My estimate is approximately 1,360-odd.

Q. I gave it to you for '59-60.

A. Oh, I'm sorry. There were none. The office did not [fol. 213c] exist.

Q. Your office was established—

A. In August.

Q. Of '60?

A. Yes.

Q. So that the 1,300-odd would be for the year 1960-61?

A. That is correct.

Q. Are these applications made once a year for the school year, or are they made for the semester?

A. They are made once a year for a school year.

Q. Is the application made for the amount of the tuition grant? Is the amount $50, or $100?

A. I do know that amount, yes, sir. The amount was put no less than $100 per child for the school year.

By the Court:

Q. You say the amount was put no less than $100?

A. Yes, sir, for the school year.

Q. If it was not put any less, what was the maximum of it?

A. There was no maximum listed. It was within the discretion of the Board of Supervisors.

Q. What was the amount granted for 1960-61?

A. It was $100 per year per child.

[fol. 213d] By Mr. Carter:

Q. This Exhibit No. 18 which I have shown you, are these applications kept on file in your office?

A. Yes.

Q. If I were a parent or guardian of a child desiring to qualify, I would come to your office and pick up one of these applications?

A. Yes, sir.

Q. I would fill it out?

A. Yes, sir.

Q. And I would leave it with you?

A. You would sign it in front of me or another notary, and then return it to me.

Q. After I fill it out pursuant to instructions, what do you do?

A. I take it, I check the name of the school listed to make sure that the child will be enrolled in a school or system of education; I satisfy myself through whatever channels are available that the child is properly enrolled, and pass it on to the board with my approval or disapproval.

Q. Let's take something specific. It is no secret that I am interested in these applications with respect to the Prince Edward School Foundation. I want to qualify. I [fol. 213e] have filled this out and under the name of the school I have listed "Prince Edward Foundation."

A. First, if the application has been filled out before school is open, I can do nothing. As soon as school is open, I check the names of those enrolled against the number in school. I check those against the applications made by the parents to make sure the child is enrolled in school. If they are, then they might be found to qualify.

Q. Do you have a list of children for whom educational grants were approved to attend the Prince Edward County Educational Foundation?

A. I have all of those that were approved by the County.

Q. Will you be able to have them tomorrow morning?

A. Yes, sir, I will have them tomorrow morning.

Q. Do you have any idea, with any accuracy, of these 1,300 or so applications, as to how many were for the Prince Edward School Foundation?

A. Yes, sir; all but five.

Mr. Carter: All but five. I think that is all.

[fol. 213f] Cross examination.

By Mr. Gravatt:

Q. Mrs. Cheatham, suppose a parent came to you and listed a child as being taught by a certain individual in a certain school run by the Prince Edward Christian Council. What would you do with that application?

A. I would accept it and recommend it for approval.

Q. What investigation, if any, would you make of the school and the enrollment?

A. The enrollment of the school?

Q. The enrollment of the child.

A. I would talk with the parent to see if the child were enrolled at that school.

Q. Would you recommend such an application?

A. Yes, sir.

Mr. Gravatt: That is all.

By the Court:

Q. Mrs. Cheatham, this Christian Foundation, or whatever the technical name of it is, did you receive any such applications for that institution?

A. No, sir, I did not.

Q. Is there such an institution in Prince Edward, to your knowledge?

[fol. 213g] A. To my knowledge, there is a school there run by the Prince Edward Christian Association.

Q. What kind of school is it?

A. I don't know. I never had occasion to take one for it, Judge.

Q. Well, is it one operating ten hours a day, or is it a summer school?

A. I know nothing about it.

Q. If you knew nothing about it—

A. I would inquire first and then make my recommendation.

Q. That is my point.

A. I'm sorry.

Q. I understood you to say you would recommend a grant to that institution.

A. Yes, sir. I would have to inquire into the institution first.

Q. If the school, after you had investigated it fully, did not meet the requirements set forth in the ordinance itself, what would you do?

A. I would have no choice but to disapprove the application if it did not meet the requirements.

Q. Well, have you made any investigation privately or as a representative of the County Board to determine [fol. 213h] whether or not, in fact, there are any other educational facilities in Prince Edward that have complied with the requirements of the County Board ordinance, other than the Prince Edward Foundation?

A. No, sir, I have not.

The Court: Thank you. Stand down.

The Court: Call your next witness.

* * * * * * *

[fol. 214] Mrs. Mary Cheatham, recalled by the plaintiffs, further testified as follows:

Direct examination.

By Mr. Carter:

Q. Mrs. Cheatham, you recall that on yesterday you were asked about the number of applications for educational grants?

A. Yes, sir.

Q. And you gave me an approximation and indicated that you would give it exactly. Are you able to give us that exact figure?

A. Yes, sir. The exact figure is 1,363.

Q. Am I correct that of that 1,363 all but 5 were for education at the Prince Edward School Foundation?

A. Yes, sir.

Q. And that all of them received from the county the $100 educational fund?

A. There were a few exceptions to all of them receiving it because of the length of time in which they were enrolled in school, but they were given a proportionate sum of it.

By the Court:

Q. They received $100 per year if they went right in? [fol. 215] A. If they went right in, yes, sir.

Mr. Carter: Thank you. That is all.

Mr. Gravatt: Mr. Carter, you asked for certain records that this lady keeps.

Mr. Carter: Yes, sir.

Mr. Gravatt: We have those records here if you want to look at them.

Mr. Carter: I think Mrs. Cheatham supplied the figures.

Mr. Gravatt: And you don't want the records?

Mr. Carter: No.

Cross examination.

By Mr. Gravatt:

Q. Mrs. Cheatham, do you have a copy of the application blank for a tuition grant?

A. No, sir, not with me.

Q. Is there one here?

Mr. Carter: It is an exhibit.

The Court: It is an exhibit in evidence.

By Mr. Gravatt:

Q. You are an employee of the Board of Supervisors of Prince Edward County; is that correct?

A. Yes, sir.

[fol. 215a] Q. In your capacity as agent of the Board of Supervisors—that is what you have been designated, I believe?

A. Yes, sir.

Q. In that capacity, what responsibility do you have in the administration of the educational payment ordinance?

A. As the agent for the Board, I am responsible for the administration of all the grants. They are made out sometimes by the parents; sometimes they are made out in my presence. I am authorized to help them if it is necessary. I am also a notary, which is necessary in the application.

Q. In filling out this form and in administering this act, if a parent comes to your office, you present one of these form to the parent and, if they ask your assistance, you assist in filling it out; is that correct?

A. Yes, sir.

Q. Among the questions on here, number one is the name of the child, birth date, residence, and things of that nature; number two, name and address of the parent, guardian, or person *in loco parentis;* number 2-A, if applicant is not a parent, give name and address of parent; 3, name and [fol. 216] address of school last attended or place of instruction; 4, name of school in which child is to be enrolled or person offering such course of instruction or training within Prince Edward County.

Now, when you got down to this No. 4, was it necessary that No. 4 be filled in that it be any system of schools or any system of instruction where a child would be going to school from the first grade, say, to high school, or was it simply necessary that there be some person who was giving instruction to a child or children?

The Court: Well, doesn't the ordinance answer that question? Doesn't the ordinance itself specify when and under what conditions the grant would be approved?

Mr. Gravatt: No, sir, I don't think it specifies all of that. It is broad, but I think there are certain areas in the administration of the ordinance that should be developed from this witness, and that is what I am trying to do.

The Court: You can ask her what she has been doing and we will consider that—I mean, how she has been interpreting it.

By Mr. Gravatt:

Q. Is it necessary that anything more be stated than [fol. 217] a responsible teacher for a child or children, teaching them, in order to make this application?

A. No, sir. My instructions from the Board of Supervisors were to investigate and to assure and satisfy myself that it was an honest effort to train and educate the children or a child. It could be four or five children, as long as it was an honest effort. That was my instructions from the Board of Supervisors.

By the Court:

Q. Whom did you get those instructions from?

A. I received those instructions fom the Board of Supervisors when I was hired.

Q. Are they in writing?

A. No, sir, they are oral.

Q. You didn't copy them down?

A. I may have a notation of my own, but they were not formal written instructions.

By Mr. Gravatt:

Q. Now, the next question: "If this is a public school located outside of Prince Edward County, state name and address and the amount of tuition to be charged."

The next question on here is No. 5. And this application has to be sworn to; is that correct?

A. Yes, sir, it must be signed and sworn to.

[fol. 218] Q. No. 5: "The undersigned is legally responsible for the care of the child for whose benefit the application is made; that said child has attained the age of six years and has not attained the age of twenty years; that the said child is a bona fide resident of Prince Edward County, Virginia and is educable; that the said child on whose behalf the application is filed will be enrolled in

either a private non-sectarian elementary or secondary school within the County of Prince Edward, Virginia, or in a public school located within the State of Virginia wherein tuition is charged in at least the amount of the grant applied for; that the child is not detained or confined in any public institution; that the said child is or will be enrolled during the school year for which the application is made; that the child has not graduated or completed the course of study offered at the high school level."

Was this application entertained if the child or the child's parents stated that the child would be enrolled for instruction by some person, firm, or corporation giving instruction within the county?

A. I didn't get that, I'm sorry.

Q. Was the application entertained—

A. Yes, sir.

[fol. 219] Q. —if the parent simply certified—

A. Yes, sir.

Q. —that the child would be enrolled—

A. Yes, sir.

Q. —with a person, firm or corporation offering some kind of educational training?

A. Yes, sir.

Q. In accordance with question No. 5 of the application?

A. Yes, sir.

Q. Now, No. 6: "The undersigned agrees to refund any grants made under the ordinance to provide funds for educational purposes adopted on 18th day of July, 1960, as provided therein if such child fails to attend school for 150 days unless excused by the Board of Supervisors, of said county."

Now, the point has been made here that certain schools may not have been eligible for these grants because they did not teach for 180 days. My question to you is. This application does not require a parent to certify that the school teaches for 180 days, does it?

A. No, sir.

Q. And all you required was that the child be enrolled and that you satisfy yourself in an honest, bona fide effort [fol. 220] was being made for a responsible person to educate the child?

A. Yes, sir.

Q. And the only additional thing that was required was that they certify that they would refund, subject to an excuse from doing so by the Board of Supervisors, if they did not attend school for 150 days?

A. Yes, sir.

Q. Now, upon your investigation, after receiving that blank filled in that way, what investigation would you make, if any, of the applicant in order to make your recommendation on the application?

A. Well, on the back there is a place where it has to be signed by me before being turned over to the Board of Supervisors, to be approved or disapproved. It was my responsibility to investigate the schools, the course of instruction, the teacher, whatever association or organization was handling the education or training of the children. If in my opinion after examining it as closely as I could I felt that it was an honest effort to train these children, no matter what type of school it was, I then handed it to the Board of Supervisors with my recommendation for approval for the first half of the payment of the grant. It was my under- [fol. 221] standing that I was to be as lenient as possible, because in our county now we are most anxious to get as many children educated as possible, and I was to regard this as leniently as possible until the first payment, and if I felt after the first payment that it was an effort to defraud, an effort to gain money without using it, then I put my disapproval on the application; but that was not final. I had to take it to the Board to explain the circumstances—what I had found out about the courses of training, and the teachers and the parents. I give them all the information I can. At that time they take it under consideration. They either go along with my approval, or rather my disapproval, and then they disapprove that application. If they disapproved, the applicant then, the parent or guardian, had a chance to appeal before the Board and also before the Court, if they felt that they were being treated unfairly. Of course, my disapproval was very properly overruled—had it ever occurred, it could have been very properly overruled. It could have been felt there were

mitigating circumstances that I could not see. It was their decision as far as I was concerned.

Q. So that in the administration of this ordinance the policy of the Board of Supervisors as applied by you was to make this money available to any person, guardian, or [fol. 222] parent who had his child in a course of instructional training in a good-faith, honest effort to try to do something to help that child educationally?

A. That is correct.

Q. And this money was available and it was the policy of the Board to make it available to people in that situation regardless of whether they had a formal school, or formal building, or formal grades, or that the teachers were accredited by the State Department, or that their surroundings were safe and sanitary—it was an effort to help people who in good faith were undertaking to serve the need of the county to educate children of any race?

A. That is right.

Mr. Gravatt: That is all.

By Mr. Denny:

Q. Mrs. Cheatham, is there any difference in the procedures when an application comes from the parent or guardian of a Negro child than the procedures adopted when it comes from the parent or guardian of a white child?

A. No, sir.

Q. You have had applications made by parents or guardians of Negro children?

A. Yes, sir.

Q. Have they been granted?

[fol. 223] A. Yes, sir; all of the applications for Negro children that my office has received have been granted.

Mr. Denny: Thank you.

Redirect examination.

By Mr. Carter:

Q. Mrs. Cheatham, the applications that were approved were 1,358, I believe?

A. 1,363.

Q. I am leaving out the five that did not go to the Prince Edward School Foundation. Those 1,358 were credited to a full-time, 180-day school?

A. Yes, sir.

Q. What about the five?

A. The five that went to public schools located within the State of Virginia.

Q. So there has not been across your desk or approved by you any educational grants for anybody to go to anything but an authorized and formal school?

A. I cannot approve what I do not receive.

Mr. Carter: That is all.

Mr. McIlwaine: No further questions.

By the Court:

Q. Do I understand, Mrs. Cheatham, that any person in [fol. 224] Prince Edward County, colored or white, who came in and told you that they were sending their child to be tutored or taught by an individual in Prince Edward County would get the $100?

A. Sir, if they came to me and told me they were sending their child to a person to be tutored, if it was an honest effort, I would naturally have some investigation to make.

Q. What kind of investigation would you make?

A. I make sure that the person doing the training is honestly trying to help educate the child.

Q. Well, a mother undertakes to educate a child, and it is a very successful effort, is it not?

A. Yes, sir.

Q. Is she eligible to get $100 if she is conscientiously trying to get the child to read and write and do a lot of other things? If she were highly conscientious and desirous of having her child learn to read and write, would she get the $100?

A. Well, my decision, of course, would not be final. I would say—

Q. Well, what would your recommendation be?

A. My recommendation would be that if a mother was trying to teach her child, there would be no expense in-
[fol. 225] volved and there would be no need for it, for an educational grant, but there would probably be an expense—

Q. What do you mean by "expense"?

A. There are certain expenses that a mother has in the process of educating a child. There are the costs of books, the costs of materials—a mother would have the cost of books if she were trying to teach her child to read, Judge. Then, if it were an honest effort to educate her child or her children, I would assume it would be an honest effort and I would give my approval, at least.

Q. Well, obviously, regardless of how conscientious the mother was, I doubt if she could equal the efforts of an accredited school in teaching the child, particularly in high school classes; regardless of how competent she was, I doubt that she could do it, but she would still be conscientious. This money, or this act was never created, was it, to give a substitute of that type for an educational system?

A. No, sir. The understanding would be that a person or association or organization would be offering this course of training or school to a group. Now, the group could be small.

Q. I am not talking about the size, but would the teachers have to have any minimum standards, any minimum
[fol. 226] qualifications, to be a person whom you might consider to be competent to teach children?

A. My instructions were that there did not have to be accredited, qualified teachers.

Q. And these children would get $100 by applying for it, regardless of their ability to teach?

A. That would be a part of my responsibility, to investigate to see if they were actually being taught, and being taught in a manner that was educational. I would have to examine that more closely.

Q. Well, let us assume they were being taught. Do you have any standards to apply to this applicant or this teacher that is going to try to teach ten people?

A. Well, I am a little familiar with the education of children; I have taught in public schools myself; I have a general idea of what is education for a child, whether they are being taught reading, writing, or arithmetic, fundamentals of education, fundamentals for learning, teacher-learner relationship.

Q. Well, are you authorized to determine whether the curriculum is sufficient to justify the payment of this amount?

A. In the case of a small organization such as you are talking about now, one teacher and ten children, I am au-
[fol. 227] thorized to make my decision. I bring it to the Board to evaluate, with my recommendation that I think it is an honest effort, an honest endeavor to train these children and give them the fundamentals of education. Then it would have received my approval.

Q. Well, as the agent of the Board, in the administering of the fund, what have you done to notify the people that they can get this money under the circumstances?

A. I personally put articles in the local newspaper.

Q. Do you have any of those articles?

A. I have them, but not with me, sir.

Q. And those articles, in substance, tell the public—

A. That they are open for children attending private schools or courses of instruction.

Q. "Private school" has a meaning. If you have any of those articles that have been printed, if you can make them available, the Court would appreciate it, but I don't want to put you to any trouble to find them.

A. I would have to go back to Farmville.

Q. You have not made a single grant—

A. No, sir.

[fol. 228] Q. —other than to students attending public schools outside of the county and those attending the Foundation?

A. That is right.

Q. Now, if it was the policy of the Board, and your duty as the agent thereof, to see that this money was used for the education of all the children in the county, why didn't you go out and at least try to get more of these private

schools organized, or do something to correct the situation of the children who were not, in fact, being educated?

A. As agent for the Board, I felt myself in the position, sir, where I did not feel it was up to me to connect myself with the forming of an educational group, though I do know, because of people who have come to me directly, who have tried to do this, who have tried to form a school somewhat along this line, and I was asked at that time, if such an occasion arose, that they were able to do it, would I come and explain the purposes of the educational grant, and I told them I would come at any time to any place and explain the purposes of the educational grant offered by the county, but I did not feel that I was in a position to try to promote an educational group, as a county employee.

[fol. 228a] Q. Well, I don't mean for you to form it—

A. I just felt that I was not in position to go out and seek it.

Q. You did not attend any church meetings, or PTA meetings, or civic group meetings, of whatever type, then, in the county to advance the possibility of these children being conscientiously educated even on this limited basis?

A. No, sir. I went to a PTA meeting of the Foundation because I was asked to go. I would have gone and, as I said, I told people who tried to organize a school I would go any time.

Q. You went to the PTA meeting for what purpose?

A. To explain the purpose of the educational grant, but I would have been glad to go and do it in the other cases.

Q. Did you explain at that PTA meeting that the students attending the Foundation were eligible for this grant if they filled out the necessary form?

A. Yes, sir.

The Court: That is all.

Mr. Gravatt: You may stand aside.

[fol. 229]

RENEWAL OF MOTIONS AND DEFERRAL OF RULING

Mr. Denny: That will be presented in my argument.

I wish at this time, in addition to the motion just made, to reiterate the motions heretofore made, on which I understand the Court likewise withholds its judgment, but for the sake of the record I reiterate those motions at this time.

The Court: All right. The Court will defer ruling at this time.

[fol. 230] Mr. Gravatt: Will Your Honor remember the record on the motion of the Board of Supervisors heretofore made?

The Court: You mean the motion to dismiss?

Mr. Gravatt: Yes, sir.

The Court: I am going to rule on all issues that are presented in this case by the supplemental complaint and the respective answers, and I would be pleased to hear from all sides, particularly the plaintiffs, and likewise from the defendants, what they contend I ought to do and what evidence to tell me why I ought not to do that and what evidence and law supports it, and I would like for the evidence or lack of evidence and what authority they have in support of their contention that I ought not to do what the plaintiffs are asking to have done. In other words, this is a full hearing of all the allegations and all of the contentions, whatever they might be, raised by the pleadings in the Prince Edward case.

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[fol. 231] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

MOTION OF DEFENDANTS BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, VIRGINIA, AND J. W. WILSON, JR., TREASURER OF PRINCE EDWARD COUNTY, VIRGINIA, TO DISMISS THE INJUNCTION ENTERED HEREIN ON NOVEMBER 16, 1961, AND FURTHER EXTENDED BY ORDER OF , 1962—Filed May 1, 1962

Now come the Board of Supervisors of Prince Edward County, Virginia, and J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia, and without waiving their several motions heretofore filed which remain undetermined but severally renewing and insisting upon the same, move the Court as follows: That the injunction entered herein on November 16, 1961, and extended by order of , 1962, be dismissed because:

1. The reasons set forth in the Motion of all defendants this day filed to dismiss the Amended Supplemental Complaint and the Motion of plaintiffs for Further Relief, or in the alternative to abstain from exercising jurisdiction over the same pending submission of the federal questions to the Supreme Court of Appeals of Virginia, directs attention to the conduct on behalf of some plaintiffs and counsel for all plaintiffs which should not be countenanced by a court and which requires that the temporary injunction entered by said orders aforesaid be dismissed.

2. It has now authoritatively been decided by the Supreme Court of Appeals of Virginia that no provision of the Constitution of the Commonwealth of Virginia and no provision of her statutes lay any duty or obligation upon the Board of Supervisors of a county to appropriate moneys [fol. 232] for the operation and maintenance of public schools within the county. These defendants aver that there is no provision of the Constitution of the United States requiring that the Board of Supervisors of Prince Edward County, Virginia, appropriate any money for the maintenance and operation of public schools within the County. These defendants further aver that there is no provision of the Constitution of the United States which forbids the Commonwealth of Virginia from making provision for the education of her children by way of tuition grants payable to the parents of the children to aid in meeting the expenses of the children in attending the school of the parent's or child's choice; and there is no provision of the Constitution of the United States which forbids the Board of Supervisors of Prince Edward County from making similar provision and from granting tax credits for contributions to private nonsectarian schools within the County.

3. The injunction of this Court improperly forbids the exercise of rights which are not in violation of either federal or state law save upon a condition which is not imposed by federal or state law and under such conditions no injunction should be granted.

4. The Constitution of the United States guarantees to parents the right to choose the schools in which their children are educated. The payment of public funds in furtherance of such constitutionally protected freedom does not violate, but is protected by the Constitution of the United States. The order of the Court enjoining the payment of such funds is, therefore, an infringement of a constitutionally protected freedom and to that extent itself violates the Constitution of the United States.

Board of Supervisors of Prince Edward County, Virginia, and J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia, By J. Segar Gravatt, Of Counsel.

J. Segar Gravatt, Blackstone, Virginia.

[fol. 233] Frank N. Watkins, Watkins and Brock, Farmville, Virginia, Counsel for Board of Supervisors of Prince Edward County, Virginia, and J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia.

Certificate (omitted in printing).

[fol. 234] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

MOTION OF DEFENDANTS COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, AND T. J. MCILWAINE, DIVISION SUPERINTENDENT OF SCHOOLS TO DISMISS THE AMENDED SUPPLEMENTAL COMPLAINT FOR FAILURE OF PROOF—Filed May 1, 1962

Now comes the County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Public Schools, two of the defendants herein, and without waiving their several motions heretofore filed which remain undetermined, but severally renewing and insisting upon the same, move the Court to dismiss the Amended Supplemental Complaint as to them on the ground that the only allegation therein contained against them or either of them has been judicially determined by the Court to be unsupported in fact.

In support of said motion, the defendants show the following:

1. The Amended Supplemental Complaint contains no allegations against the defendant T. J. McIlwaine, Division Superintendent of Public Schools.

2. The only allegation in the Amended Supplemental Complaint against the County School Board of Prince Edward County is found in paragraph 16 of the Amended Supplemental Complaint. There the plaintiffs allege on information and belief that the defendant County School Board of Prince Edward County, Virginia, "is considering and contemplating the conveyance, lease, or transfer of the public schools and public school property of Prince Edward County * * *."

[fol. 235] 3. After hearing evidence *ore tenus*, the Court, by order entered November 16, 1961, held that there was no evidence to support said allegation against the defendant County School Board of Prince Edward County, Virginia, and the relief prayed for by plaintiffs was denied.

4. For the foregoing reasons, the said defendants move that they be hence dismissed with their costs in and about this cause expended.

County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Schools, By John F. Kay, Jr., Of Counsel.

Collins Denny, Jr., John F. Kay, Jr., Denny, Valentine & Davenport, 1300 Travelers Building, Richmond 19, Virginia.

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for defendants County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Schools.

Certificate of service (omitted in printing).

[fol. 236] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al., Defendants.

NOTICE OF APPEAL—Filed November 7, 1962

Notice is hereby given that the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County, do hereby appeal to the United States Circuit Court of Appeals for the Fourth Circuit the order entered in the above styled case on the 10th day of October, 1962 and so much thereof:

1. As makes final the action of the Court in refusing to grant the several motions filed on behalf of the Board of Supervisors of Prince Edward County to dismiss the Amended Supplemental Complaint as to it.

2. As makes final the action of the Court in refusing to grant the several motions of the Board of Supervisors of Prince Edward County that the Court abstain from a determination of the questions of State Statutory and Constitutional construction as set forth in said motion and direct the plaintiffs to procure a final adjudication thereof in the State Court of Last Resort in light of the requirements of the Constitution of Virginia and in light of the requirements of the Constitution of the United States.

3. As enjoins the payment of monies as provided by county ordinance and State law to parents or persons in

loco parentis for the education of children residing in Prince Edward County.

4. As enjoins upon the condition ("so long as public schools remain closed") the payment of monies as provided by county ordinance and State law to parents or to [fol. 237] persons in loco parentis for the education of children residing in Prince Edward County.

5. As enjoins the Treasurer of Prince Edward County, his agents and employees, from allowing tax credits as provided by ordinance adopted July 18, 1962.

6. As is a final and appealable order holding that public schools may not be closed in Prince Edward County so long as such schools are operated in other counties and cities of the Commonwealth.

Frank Nat Watkins, Commonwealth's Attorney of Prince Edward County.

J. Segar Gravatt, Counsel for the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County.

Certificate of service (omitted in printing).

[fol. 238] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

NOTICE OF APPEAL—Filed November 7, 1962

Notice is hereby given that the County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Schools of said County, hereby appeal to the United States Court of Appeals for the Fourth Circuit:

1. From the orders of this Court entered in the above-captioned case on October 10, 1962, in that:

A. The Court in said orders did not but should have sustained the motions of these defendants filed May 1, 1961, to dismiss the Amended Supplemental Complaint. By considering said Amended Supplemental Complaint and entering said orders of October 10, 1962, which are final in some particulars, the Court perpetuated and made final its order of September 16, 1960, permitting the plaintiffs to file a Supplemental Complaint and its order of April 24, 1961, permitting the plaintiffs to file an Amended Supplemental Complaint, and in effect overruled the said motions of these defendants filed May 1, 1961, to dismiss the Amended Supplemental Complaint, which said motions were overruled by order of July 7, 1961, without prejudice to the right to renew the same upon conclusion of the

hearing set for July 24, 1961, and which said motions were renewed at the conclusion of said hearing (See Transcript of Trial Proceedings, July 24-27, 1961, Vol. II, page 513), and which said motions were further renewed as a part of the motion of these defendants [fol. 239] to dismiss the Amended Supplemental Complaint for Failure of Proof filed May 1, 1962.

B. The Court in said orders did not but should have sustained the motion of these defendants filed May 1, 1962, to dismiss as to them the Amended Supplemental Complaint for Failure of Proof. By considering said Amended Supplemental Complaint and entering said order of October 10, 1962, which is final in some particulars, the Court in effect overruled said motions.

2. From so much of the orders of this Court entered in the above-captioned cause on October 10, 1962:

A. As overrules the motion of these and other defendants filed May 1, 1962, to dismiss the Amended Supplemental Complaint or in the alternative to abstain from exercising jurisdiction over the same until the Supreme Court of Appeals of Virginia has had submitted to it and has had opportunity to decide the question set forth in this Court's opinion of August 23, 1961, and in its order of November 16, 1961, and which said motion was also incorporated in a motion to rehear and reconsider and to abstain filed October 3, 1962.

B. As overrules the said motion of these and other defendants filed October 3, 1962, to rehear, reconsider and abstain.

C. As enjoins the Board of Supervisors of the County and the County Treasurer, their respective agents and employees from approving and paying out any county funds authorized by the "Grant in Aid" Ordinance adopted July 18, 1960; and as enjoins the Division Superintendent of Schools of Prince Edward County, the Superintendent of Public Instruction, their agents, employees and all persons working in concert

with them, from processing or approving applications for State scholarship grants from persons residing in Prince Edward County.

[fol. 240] D. As holds that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers, if this portion of said orders has such finality as permits appeal.

Collins Denny, Jr., of Counsel for Defendants, County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Schools of said County.

Collins Denny, Jr., John F. Kay, Jr., Denny, Valentine & Davenport, 1300 Travelers Building, Richmond 19, Virginia.

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for Defendants, County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Schools of said County.

Certificate of service (omitted in printing).

[fol. 241]

IN UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8837

COCHEYSE J. GRIFFIN, MIGNON D. GRIFFIN, NAJA D. GRIFFIN and L. FRANCIS GRIFFIN, JR., infants, by and through L. FRANCIS GRIFFIN, SR., their father and next friend, OSA SUE ALLEN and ADA D. ALLEN, infants, by and through HAL EDWARD ALLEN, their father and next friend, TOBY HICKS, CARL HICKS, GREGORY HICKS, BOYCE U. Z. HICKS and JOHN HICKS, infants, by and through C. W. HICKS, their father and next friend, BETTY JEAN CARTER, an infant, by and through JAMES L. CARTER, her father and next friend, DOROTHY MAE WOOD, an infant, by and through SPENCER WOOD, JR., her father and next friend, JACQUELYN REID, an infant, by and through WARREN A. REID, her father and next friend, and L. FRANCIS GRIFFIN, SR., HAL EDWARD ALLEN, C. W. HICKS, JAMES L. CARTER, SPENCER WOOD, JR., and WARREN A. REID, Appellants and Cross-Appellees,

versus

BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY and J. W. WILSON, JR., Treasurer of Prince Edward County; STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA and WOODROW W. WILKERSON, Superintendent of Public Instruction of the Commonwealth of Virginia and County School Board of Prince Edward County, Virginia, and T. J. MCILWAINE, Division Superintendent of Schools of said County, Appellees and Cross-Appellants.

[fol. 242] Cross-Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Oren R. Lewis, District Judge.

Argued January 9, 1963.

Before HAYNSWORTH, BOREMAN and J. SPENCER BELL, Circuit Judges.

Robert L. Carter (S. W. Tucker, Henry L. Marsh, III, Barbara A. Morris, Frank D. Reeves, and Otto L. Tucker on brief) for Appellants and Cross-Appellees; Burke Marshall, Assistant Attorney General, (St. John Barrett, Harold H. Greene, and Alan G. Marer, Attorneys, Department of Justice, on brief) for the United States of America as Amicus Curiae; Collins Denny, Jr., (John F. Kay, Jr., C. F. Hicks, Denny, Valentine & Davenport, and DeHardit, Martin & Hicks on brief) for Appellees and Cross-Appellants, County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County; J. Segar Gravatt, Special Counsel for the Board of Supervisors of Prince Edward County, (Frank Nat Watkins, Commonwealth's Attorney of Prince Edward County, on brief) for Appellee and Cross-Appellant, Board of Supervisors of Prince Edward County; R. D. McIlwaine, III, Assistant Attorney General of Virginia, and Frederick T. Gray, Special Assistant Attorney General of Virginia, (Robert Y. Button, Attorney General of Virginia, on brief) for Appellees and Cross-Appellants, State Board of Education and Superintendent of Public Instruction of the Commonwealth of Virginia.

[fol. 243]

OPINION—August 12, 1963

HAYNSWORTH, Circuit Judge:

Transmuted, this old case, in its new flesh and pregnant with questions, comes again before us.

As Davis, et al., v. County School Board of Prince Edward, et al., it began in 1951 as a suit to effect the desegregation of the public schools maintained by Prince Edward County, Virginia. It was one of the four school cases decided by the Supreme Court of the United States in Brown v. Board of Education, 347 U. S. 483. As Allen, et al. v. County School Board of Prince Edward County,

Virginia, et al., the case was again before this Court in 1957[1] and, still again, in 1959.[2]

In our opinion filed in May 1959, when this case was last here, we directed the entry of an injunction requiring the then defendants to receive and consider, on a nondiscriminatory basis, applications by Negro pupils for enrollment in high school for the school term beginning in September 1959. We also directed the entry of an order requiring the School Board to make plans for the elimination of discrimination in the admission of pupils to the elementary schools at the earliest practicable date. On remand to the District Court, no order was entered until April 22, 1960, when the District Court entered a formal order requiring the immediate elimination of discrimination in the admission of Negro applicants to high schools and the formulation of plans for the elimination of discrimination in the admission of applicants to elementary schools. Meanwhile, however, all public schools in Prince Edward County had been closed.

[fol. 244] During the summer of 1959, the Board of Supervisors of Prince Edward County, though it had received from the School Board budgets and estimates of the cost of operating the schools for the 1959-60 school year, did not levy taxes or appropriate funds for the operation of the schools during that year. Though certain funds have come into the hands of the School Board, out of which it has been able to meet certain maintenance and insurance expenses and debt curtailment, it has received no funds with which it could operate the schools, for, annually, the Board of Supervisors has failed, or declined, to levy taxes or appropriate funds for the operation of the schools.

In September 1960, the present plaintiffs obtained leave to file a supplemental complaint, which was supplanted by an amended supplemental complaint filed in April 1961. By these supplemental pleadings, the County Board of Supervisors, the State Board of Education and the State Superintendent of Education were brought in as additional defendants. By the amended supplemental complaint, the

[1] 249 F.2d 462.

[2] 266 F.2d 507.

plaintiffs sought an order requiring the defendants to operate an efficient system of free public schools in Prince Edward County, forbidding tuition grants to pupils attending private schools practicing segregation, forbidding tax credits to taxpayers for contributions to private schools practicing segregation, and forbidding a conveyance or lease of any property of the School Board of Prince Edward County to any private organization.

The District Court entered an injunction against payment of tuition grants to pupils attending the schools operated by the Prince Edward School Foundation and against the allowance of tax credits by Prince Edward County on account of contributions to that Foundation. Initially, it [fol. 245] abstained from deciding the questions of state law upon which the reopening of the free public schools depended, but, after the plaintiffs had aborted the effort to have the relevant questions decided by the state courts,[3] the District Court undertook to decide them itself. It or-

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[3] The plaintiffs applied to The Supreme Court of Appeals of Virginia for a writ of mandamus to compel the Board of Supervisors to levy taxes and appropriate funds for the operation of public schools. The District Judge saw copies of the pleadings and, apparently, was of the opinion they put in issue all relevant questions. In their printed brief, however, the plaintiffs disclaimed the presence of any federal question, with the result that the court decided only one narrow issue. It held mandamus unavailable because, it concluded, the Board of Supervisors' function was legislative and discretionary, not ministerial, Griffin, et al., v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S.E. 2d 227. It did not consider whether or not Virginia or any of its agencies has an affirmative duty to operate free public schools in Prince Edward or whether it can operate public schools elsewhere while those in Prince Edward remain closed. It did not consider many of the questions of state law which underlie those two ultimate questions.

Later the defendants, or some of them, brought an action for a declaratory judgment in the Circuit Court of the City of Richmond. The plaintiffs here were named defendants there, and one of their attorneys was appointed guardian ad litem for the infants. On March 21, 1963 Judge Knowles filed an opinion in which the major questions are resolved in the favor of the agencies and officials of the Commonwealth and county. An appeal has been taken to The Supreme Court of Appeals of Virginia and will be heard in October, a few months hence. See Southern School News, July 1963, Vol. 10, No. 1, page 12.

dered the schools reopened, but postponed the effectiveness of that order pending this appeal. There was no evidence that anyone had any idea the school buildings and property owned by the School Board would be sold or leased, and no order was entered affecting their disposition.

For the District Court to get to the merits, it had to bypass a number of preliminary questions, including the very troublesome question arising under the Eleventh Amendment, all of which are brought up before us. On the merits of each of the three main issues, the parties [fol. 246] advanced innumerable alternate offenses and defenses, but it is obvious that the answer on the merits, in one instance exclusively and in other instances largely, rests upon interpretations of state law. It is also apparent that a proceeding in the state courts will avoid most of the technical procedural difficulties which must be disposed of before the merits can be determined in this action. Under these circumstances, we think the District Court properly decided, in the first instance, that it should abstain from deciding the merits of the principal issue until the relevant questions of state law had been decided by the state courts. We think it should have adhered to its abstention when resolution of the state questions by state courts was delayed because the plaintiffs, themselves, chose to withdraw them from state court consideration. We think too that abstention on the other two issues, where the answers are so closely related to the principal issue, was the proper course. Insofar as there are federal questions present which are independent of state law, as will presently appear, we conclude that the plaintiffs have shown no ground for relief, so that abstention is not inappropriate.

In 1959, after the Board of Supervisors of Prince Edward County failed to levy taxes for the operation of the schools during the school year 1959-1960, a corporation known as Prince Edward School Foundation was organized for the purpose of operating private schools in the county. It was launched by private contributions of $334,712.22. With the receipt of tuition charges[4] and continuing

[4] There were no tuition charges during the first year, 1959-1960. That year all expenses were met out of contributions. Since then tuition has been charged.

private contributions, it has successfully operated primary and secondary schools in Prince Edward County which are [fol. 247] attended solely by white pupils. It has used none of the facilities of the School Board. Until the District Judge enjoined their payment, pupils attending schools of the Prince Edward School Foundation, generally, received tuition grants paid jointly by Virginia and Prince Edward County, which approached but did not equal the tuition charges they had to pay.

Negro citizens of Prince Edward County at first made no effort to provide schools for their children. They declined proffered assistance in such an undertaking. Some of their children obtained admission to public schools in other counties of Virginia and, since 1960, obtained, or were eligible for, tuition grants when they did so. The great majority of Negro children, however, for a time, went with no schooling whatever. Later, certain "training schools" were established and a substantial number of Negro pupils, but far from all, have attended those training schools.

On the principal issue, the question whether the plaintiffs have a judicially enforceable right to have free public schools operated in Prince Edward County, the plaintiffs contend that the closure of the schools, taken either alone or in conjunction with the subsequent formation of the Prince Edward School Foundation and its operation of private schools for white pupils only, was the kind of "evasive scheme" for the perpetuation of segregation in publicly operated schools which was condemned in Cooper v. Aaron, 358 U.S. 1. The United States, as *amicus curiae* advances a different principle, contending that there is a denial of the Fourteenth Amendment's guarantee of equal protection of the laws when the Commonwealth of Virginia suffers the schools of Prince Edward County to re- [fol. 248] main closed, while schools elsewhere in the state are operated.

As to the plaintiffs' contention, it may be summarily dismissed insofar as it is viewed as a contention that the Fourteenth Amendment requires every state and every school district in every state to operate free public schools

in which pupils of all races shall receive instruction. The negative application of the Fourteenth Amendment is too well settled for argument.[5] It prohibits discrimination by a state, or one of its subdivisions, against a pupil because of his race, but there is nothing in the Fourteenth Amendment which requires a state, or any of its political subdivisions with freedom to decide for itself, to provide schooling for any of its citizens. Schools that are operated must be made available to all citizens without regard to race, but what public schools a state provides is not the subject of constitutional command.

The plaintiffs' theory may also be summarily dismissed insofar as it is viewed as a contention that the closure of the schools was a violation of the order of the District Court entered in compliance with the direction of this Court. The injunctive order, entered when the School Board and its Division Superintendent were the only defendants, re- [fol. 249] quired them to abandon their racially discriminatory practices. Without funds, they have been powerless to operate schools, but, even if they had procured the closure of the schools, they would not have violated the order for they abandoned discriminatory admission practices when they closed all schools as fully as if they had continued to operate schools, but without discrimination.

The impact of abandonment of a system of public schools falls more heavily upon the poor than upon the rich. Even with the assistance of tuition grants, private education of children requires expenditure of some money and effort by their parents. One may suggest repetition of the often

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[5] Byrd v. Sexton, 8 Cir., 277 F.2d 418, 425; Kelley v. Board of Education of City of Nashville, 6 Cir., 270 F.2d 209, 228-229; School Board of City of Newport News v. Atkins, 4 Cir., 246 F.2d 325, 327; Avery v. Wichita Falls Independent School District, 5 Cir., 241 F.2d 230, 233; Wheeler v. Durham City Board of Education, M.D.N.C., 196 F.Supp. 71, 80, reversed on other grounds, 309 F.2d 630; Dove v. Parham, E.D. Ark., 181 F.Supp. 504, 513, affirmed in part, reversed in part, 271 F.2d 132; McKissick v. Durham City Board of Education, M.D.N.C., 176 F.Supp. 3, 14; Thompson v. County School Board of Arlington, E.D. Va., 144 F.Supp. 239, affirmed 240 F.2d 59; Briggs v. Elliott, E.D.S.C. (Three Judge Court), 132 F. Supp. 776, 777.

repeated[6] statement of Anatole France, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." That the poor are more likely to steal bread than the rich or the banker more likely to embezzle than the poor man, who is not entrusted with the safekeeping of the moneys of others, does not mean that the laws proscribing thefts and embezzlements are in conflict with the equal protection provision of the Fourteenth Amendment. Similarly, when there is a total cessation of operations of an independent school system, there is no denial of equal protection of the laws, though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in the locality.

This we held in a different context in Tonkins v. City [fol. 250] of Greensboro, 4 Cir., 276 F.2d 890, affirming 162 F. Supp. 549. Faced with the necessity of desegregating the swimming pools it owned, the City of Greensboro, North Carolina, chose instead to sell them. Upon findings that the sale of the pool, which the City had theretofore reserved for use by white people only, was bona fide, it was held that there had been no denial of the constitutional rights of the Negro plaintiffs, though the pool was thereafter operated on a segregated basis by its private owners.[7]

Similarly, when a state park was closed during pendency of an action to compel the state to permit its use by Negroes on a nondiscriminatory basis, we held that closure of the park mooted the case requiring its dismissal.[8]

Other courts have clearly held that a municipality which had been ordered to desegregate facilities which it had operated, may abandon the facilities without violating the injunctive order or the rights of the Negro plaintiffs.[9] The

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[6] See Griffin v. Illinois, 351 U.S. 12, 23, 76 S.Ct. 585, 593, 100 L.Ed. 891; Hall v. St. Helena Parish School Board, E.D. La. (Three Judge Court), 197 F. Supp. 649, 655.

[7] See also City of Greensboro v. Simkins, 4 Cir., 246 F.2d 425.

[8] Clark v. Flory, 4 Cir., 237 F.2d 597.

[9] Hampton v. City of Jacksonville, 5 Cir., 304 F.2d 319; Gilmore v. City of Montgomery, 5 Cir., 277 F.2d 364; and see Willie v. Harris County, E.D. Texas, 202 F. Supp. 549.

only limitation of the principle is that a municipality may not escape its obligations to see that the public facilities it owns and operates are open to everyone on a nondiscriminatory basis by an incomplete or limited withdrawal from the operation of them. If the municipality reserves rights to itself in disposing of facilities it formerly owned and operated, subsequent operation of those facilities may still be "state action." [10]

[fol. 251] Nothing to the contrary is to be found in James v. Almond.[11] There, the Court had ordered the admission of seventeen Negro pupils into six of Norfolk's schools theretofore attended only by white pupils. Under Virginia's "Massive Resistance Laws," the Governor of Virginia thereupon seized the six schools, removed them from Norfolk's school system and closed them. All other schools in Norfolk and elsewhere in Virginia remained open. It was held, of course, that the statutes under which the Governor acted were unconstitutional, for Virginia's requirement that all desegregated schools be closed while segregated schools remained open was a denial of equal protection of the laws. There was no suggestion that Virginia might not withdraw completely from the operation of schools or that any autonomous subdivision operating an independent school system might not do so.

The decision in Hall v. St. Helena Parish School Board[12] is not a departure from the principle. There, it appeared that, confronted with court orders to desegregate schools in certain parishes in Louisiana, the Governor of that State called an extraordinary session of the Legislature, which enacted a number of statutes designed to frustrate enforcement of the court's orders. One of the statutes provided for the closure of all schools of a parish upon a majority vote of the parishioners. It was accompanied by other statutes providing for the transfer of closed schools to private persons or groups, providing for educational cooperatives and regulating their operations, providing tui-

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[10] Hampton v. City of Jacksonville, 5 Cir., 304 F. 2d 320.

[11] E.D. Va. (Three Judge Court) 170 F. Supp. 331.

[12] E.D. La. (Three Judge Court) 197 F. Supp. 649.

tion grants payable directly to the school and not solely to the pupils and their parents, providing for general [fol. 252] supervision of the "private schools" by the official state and local school boards, and providing, at state expense, school lunches and transportation for pupils attending the "private schools." Construing all these statutes together, as it was required to do, the Court, with abundant reason, concluded that the statutes did not contemplate an abandonment of state operation of the schools but merely a formal conversion of them with the expectation that the schools would continue to be operated at the expense of the state and subject to its controls. Desegregation orders may not be avoided by such schemes, but there is nothing in the *Hall* case which suggests that Louisiana might not have withdrawn completely from the school business. It was only because it had not withdrawn that the statutes which composed its evasive scheme of avoidance were struck down.

The plaintiffs largely content themselves with assertions that closure of the schools was motivated by the filing of our opinion in May 1959, from which it was apparent that the District Court would be required to enter a desegregation order. They emphasize a resolution adopted in 1956 by a predecessor Board of Supervisors expressing an intention to levy no tax and appropriate no funds for the operation of desegregated schools.[13] More broadly, they contend that closure of the schools, with the effect of avoiding the operation of integrated schools, is a violation of the Fourteenth Amendment or of the injunctive order. [fol. 253] Facially, what we have said will dispose of the plaintiffs' contention, but the matter does not necessarily end there. As we have seen, if Virginia or Prince Edward County can be said to be still operating schools through the Prince Edward School Foundation, then the principles of Cooper v. Aaron, 358 U.S. 1, would require a remedial order.[14] If Prince Edward County has not completely with-

[13] One of the questions much debated is whether a court may inquire into the motive of a legislative body when it considers the constitutionality of the legislative body's acts or inaction.

[14] See Hall v. St. Helena Parish School Board, E.D. La. (Three Judge Court), 197 F.Supp. 649; Hampton v. City of Jacksonville, 5 Cir., 304 F.2d 320; City of Greensboro v. Simkins, 4 Cir., 246 F.2d 245.

drawn from the school business, then it cannot close some schools while it continues to operate others on a segregated basis.[15]

The plaintiffs do not contend that Prince Edward County or Virginia had a hand in the formation of the Prince Edward School Foundation. There is no suggestion that any agency, or official, of Virginia, or of Prince Edward County, has any authority to supervise the operation of the schools of the Prince Edward School Foundation, except insofar as Virginia exercises a general police supervision over all private schools and except that Virginia accredited the schools of the Foundation when they met the requirements applicable to all private schools. Indeed, during the first year of operation, the schools of the Foundation appear to have been as independent of governmental authority as any sectarian or nonsectarian private school in Virginia.

Beginning with the school year 1960-1961, pupils attending schools of the Foundation did receive tuition grants. One of Virginia's statutes[16] providing for the [fol. 254] tuition grants authorized participation by the counties if a particular county does not participate in the tuition grant program, the state will pay the maximum allowable grant but will deduct a portion of its payment from other state funds distributed for purposes unrelated to schools to the nonparticipating county.[17] It was apparently for that reason that in 1960 the Board of Supervisors of Prince Edward County provided for tuition grants which would take the place of a portion of the state grant but would not supplement the funds otherwise available to the pupil. In its effect upon Prince Edward County, its participation in the state-wide program of tuition grants amounted to no more than taking dollars from one of its pockets and putting them into another. As for pupils who were residents of Prince Edward County attending schools of Prince Edward Foundation, or any private school, or a

[15] James v. Almond, E.D. Va. (Three Judge Court), 170 F.Supp. 331.

[16] Code of Virginia § 22-115.31 (1960 Cum. Supp.).

[17] Code of Virginia § 22-115.34 (1960 Cum. Supp.).

public school outside of the county, they got no more by reason of the county's participation in the program.

In 1960, the Board of Supervisors of Prince Edward County also adopted an ordinance providing for credits to taxpayers, not exceeding twenty-five per cent of the total tax otherwise due, for contributions to nonsectarian schools not operated for profit located in Prince Edward County, or to be established and operated in that county during the ensuing year. During the school year 1960-1961, credits aggregating $56,866.22 were allowed by Prince Edward County on account of contributions made to the Foundation.

The allowance of such tax credits appears to be an indirect method of channeling public funds to the Foundation. [fol. 255] They are very unlike Virginia's program of tuition grants to pupils which has a lengthy history.[18] The allowance of such tax credits makes uncertain the completeness of the County's withdrawal from the school business. It might lead to a contention that exclusion of Negroes by schools of the Foundation is county action. Their allowance, however, during the second[19] of the four years that the Foundation has operated its schools does not require a present finding on this record that the County is still in the school business, and that the acts of the Foundation are its acts.

Bearing in mind the fact that the Foundation established and operated its schools without utilization of public facilities and, during the first year, without any direct or indirect assistance of public funds, and the clear showing of

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[18] Virginia's tuition grant program had its first beginning many years ago in aid of children who had lost their fathers in World War I. It was expanded to include others until 1955 when the Supreme Court of Appeals of Virginia held that the tuition grants were in violation of Virginia's Constitution when given to pupils attending private schools. Almond v. Day, 197 Va. 419, 89 S.E. 2d 851. Section 141 of Virginia's Constitution was promptly amended to overturn the result of *Almond* v. *Day*. The statutes authorizing Virginia's present, broad program of tuition grants were enacted in 1960.

[19] In the first year of the Foundation's operation, the County had no provision for any tax credits for contributions. After the second year, no such credits were allowed because of the Court's order.

the independence of the Foundation from the direction and control of the defendants, the allowance of the tax credits is at least equivocal. Inferences of power to influence, if not to control, may follow such encouragement of contributions, though the allowance of income tax deductions by the State and United States for contributions to religious and charitable organizations is not thought to make state or nation a participant in the affairs and operations of the beneficiaries of the contributions. Indeed, their allowance [fol. 256] has come in recognition of public interest in encouragement of private contributions to religious, educational and charitable institutions and organizations. Here, however, the allowance of the tax credit comes in a more particularized context, and that context is not complete without consideration of Virginia's tuition grants.

As indicated above, Virginia's tuition grants had a considerable history. That program has not been attacked in this case. Its constitutionality has not been questioned. Elsewhere, apparently, it has not been utilized to circumvent the segregation of public schools. In the school year just closed, thirty-one school districts in Virginia were desegregated to some degree.[20] The basic program of tuition grants, however, its antecedents and its operation and effect were not examined by the court below.[21]

Moreover, the effect of tax credits and tuition grants ought to be determined only in the light of the correlative duties and responsibilities of the Commonwealth and the County in connection with the operation of schools in the County. What they are and how they are distributed turn entirely upon the proper construction of a number of constitutional and statutory provisions of the Commonwealth. If, as the District Court found, Virginia's Constitution requires the Commonwealth as such to open and operate schools in Prince Edward County, what Prince Edward County does in the allowance of tax credits for contributions to otherwise independent educational institutions may

[20] Southern School News, June 1963, Vol. 9, No. 12, page 1.

[21] It enjoined payment of tuition grants by the state because it construed the state statutes as not authorizing them, a construction which we find, at least, dubious.

[fol. 257] be of little moment. On the other hand, if Prince Edward County should be held to have a duty under state law to operate free public schools, then its allowance of tax credits might be a basis for a conclusion, in light of the tuition grant program, that it was undertaking to discharge its duty by indirection and, in effect, was operating the schools of the Foundation.

Such a determination can be made only when the underlying questions of state law have been settled.

The two branches of the principal issue are closely interrelated. As appears above, the question of whether or not Prince Edward County, or Virginia, has such a hand in the operation of the schools of the Foundation as to result in a Fourteenth Amendment requirement that they operate free, public schools on a nondiscriminatory basis for all pupils in the county is dependent, in large measure, upon a determination of Virginia's distribution of authority, duty and responsibility in connection with the schools and their control and operation. Applicability of the principle advanced by the United States as *amicus curiae* depends entirely upon the answers to those questions of state law, for no one questions the principle that if Virginia is operating a state-wide, centralized system of schools, she may not close her schools in Prince Edward County in the face of a desegregation order while she continues to operate schools in other counties and cities of the Commonwealth. Application of the constitutional principle turns solely upon a determination, under state law, of Virginia's role in the operation of public schools in Virginia.[22]

[fol. 258] The answers to these questions are unresolved and unclear. On the one hand, the United States points to Section 129 of Virginia's Constitution, which provides, "The General Assembly shall establish and maintain an efficient system of public, free schools throughout the state," and to those constitutional and statutory provisions

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[22] Here, the Eleventh Amendment question arises. The more the United States asserts that Virginia's Constitution places affirmative, but neglected duties upon Virginia's General Assembly and State Board of Education, the closer it skirts the Eleventh Amendment's prohibition against suits in the courts of the United States by citizens against a state.

providing for a State Board of Education and a Superintendent of Public Instruction, and defining their duties and responsibilities. On the other hand, the defendants point to Section 133 of Virginia's Constitution which provides that supervision of schools in each county and city shall be vested in a school board and to other constitutional and statutory provisions which, unquestionably, vest large discretionary power in local school boards and in the governing bodies of the counties and cities in which they function.

By Section 130 of the Constitution, the State Board of Education "has general supervision of the school system." It has the power to divide the state into school divisions, though no school division may be smaller than one county or one city. When a Division Superintendent of Schools is to be appointed, the State Board of Education certifies to the local board a list of qualified persons, and the local board may appoint anyone so certified. It selects and approves textbooks for use in the schools. It is required to manage and invest certain school funds of the state, and the General Assembly is empowered to authorize the State Board to promulgate rules and regulations governing the management of the schools.

Section 135 of Virginia's Constitution requires the application of receipts from certain sources to schools of the primary and grammar grades. These "constitutional funds" are apportioned among the counties and cities according to [fol. 259] school population. In addition, the General Assembly is authorized to appropriate other funds for school purposes, and those funds are apportioned as the General Assembly determines. Section 136 of the Constitution authorizes the counties and towns to levy taxes and appropriate funds for use "in establishing and maintaining such schools as, in their judgment, the public welfare may require."

The General Assembly of Virginia has adopted the consistent practice of appropriating funds, other than the "constitutional funds," for distribution to the counties and cities for school purposes. Such appropriations are conditioned upon local appropriations. Thus, before the schools in Prince Edward County were closed, the local school

board received its proportion of the constitutional funds, and, in addition, it received whatever funds were appropriated by Prince Edward's Board of Supervisors, plus matching funds from the state which became payable because of the local appropriation. Since the schools were closed, the Prince Edward County School Board received no funds from the state during the school year 1959-1960. It has received its proportionate part of the constitutional funds, but those only, in subsequent years, and these are the funds it has used to keep its physical properties in repair and insured, but they have been insufficient to enable it to do anything else.

This arrangement, the defendants say, is a local option system under which each county is authorized to determine for itself whether or not it will operate any schools and, if so, what schools and what grades. They emphasize the provisions of Section 136 of the Constitution which gives the local authorities the right to appropriate funds "in establishing and maintaining such schools as, in their judg- [fol. 260] ment, the public welfare may require," which is limited by a provision that, until primary schools are operating for at least four months per year, schools of higher grades may not be established. This, they say, clearly authorizes and requires what is done in practice. The local school board, it is said, determines what schools and facilities are required. It budgets the estimated costs of their maintenance and operation, and submits its estimates to the local Board of Supervisors. The Board of Supervisors may not overturn particular determinations of the school board, but it, say the defendants, has an unfettered discretion in levying taxes and appropriating funds. It may appropriate funds equal to the school board's budgetary estimate, but it also may appropriate less or nothing at all. If the Board of Supervisors appropriates nothing for use by the school board, then the matching state funds are unavailable and the schools cannot be operated.

Among Virginia's statutes may be found clear provisions for local option. Under Sections 16.1-201-2 of the Virginia Code, a county may elect to establish juvenile detention facilities. If it does so, the state will contribute funds to meet, in part, the cost of construction and operation. Under

Section 32-292, et seq., a county may elect to participate in a program of state-local hospitalization. If a county elects to do so, the state, with certain limitations, will contribute one-half the cost of such hospitalization. The defendants suggest that there is no unconstitutional geographic discrimination in such local option programs, though one or more counties may not elect to participate in them.

Federal analogies readily come to mind. The United States makes available to participating states which enact [fol. 261] prescribed legislation, grants for unemployment compensation administration.[23] Under the National Defense Education Act,[24] federal funds are made available to localities conducting in their schools approved programs of science, mathematics and foreign languages. It is suggested that there is no geographic discrimination in the provision for such optional grants, though a state or locality may exercise its opinion not to participate.

Such local option provisions as those the defendants think analogous are constitutionally unassailable.[25] When a state undertakes to encourage local conduct of educational or social programs by making matching funds available to participating localities, there is no discrimination against nonparticipating localities. Since every locality may participate if it wishes to do so, and the state funds are available to each upon the same conditions, the state is even-handed.

The question here, however, is whether Virginia's school laws establish an arrangement within the local option principle the defendants advance. If Section 129 of Virginia's Constitution imposes upon the General Assembly the duty to provide operating, free, public schools in every county, as the United States contends, its election to establish a system having features of a local option arrangement may be permissible under state law only so long as

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[23] 42 USCA § 501, et seq.

[24] 20 USCA § 401, et seq.

[25] Salsburg v. Maryland, 346 U.S. 545; Ohio *ex rel.* Lloyd v. Dollison, 194 U.S. 445; Rippey v. Texas, 193 U.S. 504; Ft. Smith Light & Traction Co. v. Board of Improvement, 274 U.S. 387.

[fol. 262] schools are operated in every county. On the other hand, if Section 129 of Virginia's Constitution, construed in the light of other constitutional provisions, requires of the General Assembly only that it provide for a system of education under which counties and cities are authorized to establish and maintain schools of their own with state assistance, then the principle which the defendants assert may be applicable. The answer is unclear. It requires interpretation and harmonization of Virginia's Constitution and statutes.

The question is unresolved. Virginia's Supreme Court of Appeals has considered her school laws in a number of cases, but none of them settle the question here.

In School Board of Carroll County v. Shockley, 160 Va. 405, 168 S.E. 419, the Court held unconstitutional an act of the General Assembly requiring the imposition of local taxes and the use of the proceeds in the construction of a particular school.[26] In Board of Supervisors of Chesterfield County v. School Board of Chesterfield County, 182 Va. 266, 28 S.E. 2d 698, the Court said that the local school board is "to run the schools," and it alone has the power to determine how locally appropriated funds are to be spent. In Griffin v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S.E. 2d 227, the Court held that in levying taxes and appropriating funds for school purposes, the Board of Supervisors exercised a legislative and discretionary function, and that it was not subject to mandamus. In Scott County School Board v. Board of Supervisors, 169 Va. 213, 193 S.E. 52, it had been held that mandamus was not available to a school board to compel the supervisors of its county to appropriate funds sufficient [fol. 263] to cover the school board's estimates of the cost of school operation.

In none of those cases, however, has Virginia's Supreme Court of Appeals considered the requirements of Section 129 of the Constitution when schools cease to operate because the local Board of Supervisors levies no taxes and appropriates no funds for the purpose. That Court may conclude that, in light of the closure of the schools in Prince

[26] See also Almond v. Gilmer, 188 Va. 1, 49 S.E. 2d 431.

Edward County, Section 129 of the Constitution requires something more of the General Assembly or of the State Board of Education.

That conclusion, however, is not forecast by Harrison v. Day, 200 Va. 439, 106 S.E. 2d 636, in which Virginia's Supreme Court of Appeals struck down Virginia's massive resistance laws. Nor is there anything in the Three-Judge Court decision of James v. Almond, E.D. Va., 170 F. Supp. 331, which approaches federal determination of this state question. There, the Governor seized and removed from the school system six of Norfolk's schools subject to desegregation orders. He acted under color of a state statute which required him to do so. In holding the statute unconstitutional the Court did not decide that all schools in Virginia were administered by the state on a state-wide, centralized basis. The seizure was clearly that of the Governor and the discrimination was inherent in the statute whether the schools were otherwise operated upon a local option basis or directly by the state. When the state acts to seize and close every school subject to a desegregation order, its sufferance of continued operation of other schools within its borders is as discriminatory as its direct operation of them.

[fol. 264] These controlling questions of state law, uncertain and unsettled as they are, ought to be determined by the Supreme Court of Appeals of Virginia, which alone has the power to give an authoritative interpretation of the relevant sections of Virginia's Constitution and of her statutes. As it was so forcefully said in Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, this Court cannot settle the state questions; it can do no more than predict what Virginia's Supreme Court of Appeals will do when the questions come before it. If we should hazard a forecast and it should be proven wrong, any present judgment based upon it will appear both gratuitously premature and empty when the state questions are authoritatively resolved in the state courts. Particularly is this true when, with so little to guide us, we cannot predict with any semblance of confidence how the several state questions will be ultimately resolved in the state courts. In

such circumstances, abstention until the state questions are determined is the proper course.[27]

Abstention, under the circumstances, is all the more appropriate because the case of County School Board of Prince Edward County, Virginia, et al., v. Griffin, et al., is already pending on the docket of the Supreme Court of Appeals of Virginia and will be heard by that Court in October. From a reading of the opinion of the Circuit Court of the City of Richmond in that case, it appears that the essential questions of state law upon which decision here turns are presented in that case and will be determined by that Court as it considers and adjudicates [fol. 265] the same primary question tendered in this case, the existence of judicially enforceable rights in the plaintiffs to have the schools reopened. That state court proceeding had not been commenced when the District Judge acted on the primary question in this case. In abandoni his earlier decision to abstain, he referred to the fact that no such proceeding was pending or then contemplated. Had it been then pending, he probably would have awaited its outcome. The fact that a case, apparently ripe for decision, is now pending on the docket of Virginia's Supreme Court of Appeals, makes easier our conclusion that the controlling questions of state law, which govern the application of unquestioned constitutional principles, ought to be determined by the state courts, and that, when they may be so determined, the federal courts ought to abstain from constitutional adjudication premised upon their notions of state law which may or may not turn out to be accurate forecasts.

Accordingly, the judgments below will be vacated and the case remanded to the District Court, with instructions to abstain from conducting further proceedings until the Supreme Court of Appeals of Virginia shall have decided the case now pending on its docket entitled County School Board of Prince Edward County, Virginia, et al., v. Leslie Francis Griffin, Sr., et al., and that decision has become

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[27] Railroad Commission of Texas v. Pullman Company, 312 U.S. 496; Harrison v. N.A.A.C.P., 360 U.S. 167; Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101.

final, with leave to the District Court thereafter to entertain such further proceedings and to enter such orders as may then appear appropriate in light of the determinations of state law by the Supreme Court of Appeals of Virginia.

Vacated and remanded.

[fol. 266] J. SPENCER BELL, Circuit Judge, dissenting:

Because of the inordinate delays which have already occurred in this protracted litigation, I hasten, without exhausting the subject, to indicate the reasons for this dissent.

I think the order of the District Court should be implemented at once for either of two reasons, each of which is amply supported by the findings of fact and the conclusions of law set forth in the District Court's opinion. First, because the public school system of Virginia is maintained, supported and administered on a statewide basis by the Commonwealth of Virginia; therefore, the closure of the schools of this one county constitutes discrimination. Second, the defendants closed the schools solely in order to frustrate the orders of the federal courts that the schools be desegregated.

The plaintiffs assert a federal right guaranteed by the Constitution; the jurisdiction to determine this right is vested in the federal courts. A refusal to adjudicate this right would be violation of the courts' duty. *Monroe* v. *Pate*, 365 U.S. 167 (1961). The plaintiffs must not be required to exhaust their remedies in the state's courts before having their federal rights determined in the federal courts. *McNeese* v. *Board of Education*, 31 U.S. L.W. 4567 (decided June 3, 1963). The defendants have been given ample opportunity heretofore to have the state courts speak. In its opinion of July 25, 1962, the district court said:

> ". . . upon the further assurance of counsel for the Board of Supervisors of Prince Edward County (which assurance was given after conferring with the Attorney [fol. 267] General of Virginia and counsel for the School Board of Prince Edward County) that he would file such a suit if the petitioners failed to do so, this

court abstained from determining the issue, pending a final ruling by the Supreme Court of Appeals of Virginia."

In spite of this assurance the defendants not only failed to bring a suit for this purpose, but they deliberately failed to raise the issue in a suit brought by the plaintiffs to assert their rights under the Virginia Constitution. Finally, at long last, when the district court proceeded to declare the plaintiffs' rights under federal law, the defendants commenced the suit to raise the issue in the state courts, demanding that the federal courts further abstain. This is not abstention—this would be a humble acquiescence in outrageously dilatory tactics, and the district court was right to reject it. We have neither the duty nor the right to pressure the state courts to declare federal rights, and they are not bound by conscience or law to engage in a race with the federal courts to declare federal rights.[1] Courts are not self-activating, if the defendants here chose to refrain from seeking a state court determination until the district court was finally forced to act, they should not now be heard to call for further abstention—when as the district court said on October 10, 1962: "Abstention would create an irreparable loss in the formal education of the children of Prince Edward County". Abstention is not sanctioned by any law—it is a court evolved doctrine of courtesy—it must not be used to frustrate the plain rights of litigants. [fol. 268] To do so now under the present posture of this case is not abstention, it is abnegation of our plain duty.

A brief review of the record leaves no doubt whatsoever that the public schools of Virginia were established and are being maintained, supported and administered in accordance with state law, primarily on a statewide basis. I see no need to review in detail the evidence supporting that conclusion. The Constitution of the state compels the Legislature to appropriate funds for this purpose—funds derived from the taxation of Negroes as well as whites in Prince Edward and other counties. The Virginia Code

[1] The Supreme Court of Appeals of Virginia refused last June to put the case ahead on its calendar.

provides that the public free school system shall be administered by a State Board of Education which is responsible for dividing the state into appropriate school divisions. The State Board prescribes the rules and regulations for conducting the high schools as well as the requirements for admission. A Superintendent of Public Instruction is appointed by the Governor. Local school boards are regulated to a great extent by state law. All power of enrollment or placement of pupils in the public schools is vested in a State Pupil Placement Board, whose members likewise are appointed by the Governor. I do not believe that it can be seriously argued that public education is not a state function in Virginia. This being true, since the state maintains and operates schools elsewhere in the state, its failure to do so in Prince Edward County, by permitting the County Board of Supervisors to close the schools for a discriminatory reason, violates the Fourteenth Amendment.

The district court's finding that Virginia is operating and maintaining a statewide system of schools not being clearly erroneous is binding on us. Indeed it is a fact so firmly established that we would be required to take ju- [fol. 269] dicial notice of it. That decision is buttressed by the decision of the three judge district court in *James* v. *Almond*, 170 F. Supp. 321, 337 (E.D. Va. 1959), wherein the court said:

> "Tested by these principles we arrive at the inescapable conclusion that the Commonwealth of Virginia, having accepted and assumed the responsibility of maintaining and operating public schools . . . [cannot close one or more because of segregation] . . . While the State of Virginia directly or *indirectly* maintains and operates a school system with the use of public funds, *or participates by arrangement or otherwise* in the management of such a school system [it may not close schools to avoid segregation]." (Emphasis added).

It is worthy of note that the Supreme Court of Appeals of Virginia points to the mandatory provisions of Section 129 of that state's Constitution, which provides: "The

General Assembly shall establish and maintain an efficient system of public free schools throughout the State". *Griffin* v. *Board of Supervisors of Prince Edward Co.*, 203 Va. 321, 124 S.E.2d 227.

Faced with the inescapable fact that the State of Virginia is maintaining and operating a statewide system of schools, the deeply abstruse and highly technical arguments about whether Virginia's laws permit a local unit to close its schools are academic under the Fourteenth Amendment. For this purpose the county is acting as an agency of the state, and the state may not directly or indirectly evade the command of the Amendment. What the state could not do directly in *James* v. *Almond* it may not do indirectly in this [fol. 270] case. In *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, Aff'd. 365 U.S. 569 (three judge court), the State of Louisiana attempted to set up a local option system to avoid a court order to desegregate. The court struck down the law and forbade the practice. In doing so it said:

> "The equal protection clause speaks to the state. The United States Constitution recognizes no governing unit except the federal government and the state. A contrary position would allow a state to evade its constitutional responsibility of carve-outs of small units. At least in the area of declared constitutional rights, and specifically with respect to education, the state can no more delegate to its subdivisions a power to discriminate than it can itself directly establish inequalities. When a parish wants to lock its school doors, the state must turn the key. If the rule were otherwise, the great guarantee of the equal protection cause would be meaningless."

And this court in an opinion concurred in as to this point by every member of the court, including the members of the present panel, in the case of *Bell* v. *School Board of Powhatan Co.* (No. 8944, decided June 29, 1963), ... F.2d ....., said of the School Board of that Virginia County:

> "They are not told to exercise powers they do not have; they are merely forbidden to take any steps themselves toward the closing of the schools, and *this injunction is necessary to prevent a violation of the equal protection of the Fourteenth Amendment.*" (Emphasis added).

[fol. 271] Whether the local unit is ordered to close its schools or permitted to do so under state law is immaterial, so long as the state directly or indirectly participates in the operation of a statewide system of schools.

Nor do I think this suit is barred by the Eleventh Amendment to the Constitution of the United States. It is well settled that a suit against a political subdivision of a state, such as a county, is not barred by the Eleventh Amendment. The leading decision in *Lincoln County* v. *Luning*, 133 U.S. 529 (1890), where the point was urged that the county is an integral part of the state and could not, therefore, be sued under the Eleventh Amendment. The Supreme Court said:

> "... It may be observed that the records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the federal courts in such suits has become established."

In *Kennecott Copper Corporation* v. *State Tax Comm.*, 327 U.S. 573 (1946), the Supreme Court again held that consent was not necessary for suits against counties and municipalities. In short, insofar as the Eleventh Amendment is concerned a suit in equity to compel affirmative action by a county through its Board of Supervisors is maintainable for the simple reason that a county as such is not a "state" within the meaning of the constitutional prohibition. I am aware of those cases cited which invoke the constitutional bar if the subsidiary political unit bears such a relationship to the state in the particular function involved as to constitute it an agent of the state with respect to that function. They do not apply in this case. This court [fol. 272] has recently discussed this distinction in *Duck-*

worth v. *James*, 267 F.2d 224 (4 Cir. 1959), *cert. denied* 361 U.S. 835. There it was held that an injunction would lie to restrain the City of Norfolk from withholding funds from the Norfolk School Board. It is the state scheme itself which provides that part of the essential operating revenue must come from the taxes levied by local boards. The words of this court in *Duckworth* v. *James, supra,* are pertinent:

> "The present case falls within the class of cases where a public officer or agent makes use of his authority to perform an illegal act by invoking the command of an unconstitutional statute or *seeks to carry out a valid statute in an unconstitutional manner.* (Emphasis added). In such cases it is held that his action is not the act of the state but the act of an individual which may be restrained by the injunctive power of the federal court."

Neither am I impressed with the argument that the district court has no power to compel a levy of taxes for a monetary appropriation by the defendant Board of Supervisors should it fail to obey the mandate of the district court. It should be enough to cite *Virginia* v. *West Virginia,* 246 U.S. 565 (1918). There the defense was advanced by West Virginia that the judicial power of the United States did not extend to the coercing of a judgment by a decree requiring a tax to be levied. The opinion of the court is plain in its implication that West Virginia could be compelled to pay if compulsion were the only way to accomplish the result. But it is necessary here only to decide whether the subdivision of the state (Prince Edward County) may be required to provide the funds necessary to comply with the judgment. There can be no doubt [fol. 273] that the judicial power may enforce the levy of a tax to meet a judgment rendered. *Labette County Commissioners* v. *Moulton,* 112 U.S. 217 (1884). See also *Graham* v. *Folsom,* 200 U.S. 248 (1906). It is to be noted that the Supreme Court of Appeals of Virginia in *Griffin* v. *Board of Supervisors of Prince Edward County,* 203 Va. 321, 124 S.E.2d 227 (1962), did not consider whether under federal law the County Board could be compelled to levy

taxes and appropriate funds for the operation of the county public school system. The Virginia law does not prohibit the Supervisors from levying the taxes and appropriating the revenue, it merely vests in them the power to decide whether this shall be done. In *City of Galena* v. *Amy*, 72 U.S. (5 Wall.) 705 (1866), a suit was brought in a federal court to recover interest on bonds. The Supreme Court required that discretionary taxing power be exercised in a particular manner. I think that under federal constitutional law an affirmative order is appropriate here notwithstanding the unavailability of mandamus under Virginia law. The County Board has the unquestionable power to levy the taxes; the schools of this County may not remain closed while the state maintains a school system elsewhere.

Finally, the Board of Supervisors of Prince Edward County closed the public schools for the sole purpose of avoiding compliance with the decree of this court. The district court so found. The Board publicly proclaimed its intention and purpose by its resolution dated May 3, 1956:

> "Be It Resolved, That the Board of Supervisors of Prince Edward County . . . do hereby declare it to be the policy and intention of the said Board . . . that no tax levy shall be made . . . nor public revenue derived [fol. 274] from local taxes . . . be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any arrangement or plan whatsoever."

This was the defiant response to the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), applying expressly to the schools of Prince Edward County. The district court found that it was passed in anticipation of our decision in 1959 that desegregation in compliance with *Brown* should commence in the fall of 1959. In the factual context of this case I cannot agree with the majority that this was a permissible compliance with the Supreme Court's order. The law has long been settled that such conduct violates the Fourteenth Amendment and may be enjoined. *Brown* v. *Board of Education*, 347 U.S. 483; *Cooper* v. *Aaron*, 358 U.S. 1; *Aaron* v.

Cooper, 261 F.2d 97 (8 Cir. 1958); *James* v. *Duckworth*, 170 F.Supp. 342 (E.D. Va. 1959); *James* v. *Almond*, 170 F.Supp. 331 (E.D. Va. 1959); *Aaron* v. *McKinley*, 173 F.Supp. 944 (E.D. Ark. 1959), *Aff'd sub nom. Faubus* v. *Aaron*, 361 U.S. 197; *Bush* v. *Orleans Parish School Board*, 190 F.Supp. 861 (E.D. La. 1960). Equal educational opportunity through access to nonsegregated public schools is secured by the Constitution. The state has an affirmative duty to accord to all persons within its jurisdiction the benefits of that constitutional guarantee. *Taylor* v. *Board of Education*, 294 F.2d 36 36 (2 Cir. 1961). Indeed Congress regarded so highly the duty of maintaining public schools that when it readmitted at least three Confederate states, Virginia, Mississippi and Texas, it specifically required that their constitutions:

> [fol. 275] "... shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of school rights and privileges secured by the constitution of said State." 16 Stat. 62, 67 and 80 (1870).

It is tragic that since 1959 the children of Prince Edward County have gone without formal education. Here is a truly shocking example of the law's delays. In the scales of justice the doctrine of abstention should not weigh heavily against the rights of these children.

[fol. 276] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8837.

COCHEYSE J. GRIFFIN, MIGNON D. GRIFFIN, NAJA D. GRIFFIN and L. FRANCIS GRIFFIN, JR., infants, by and through L. FRANCIS GRIFFIN, SR., their father and next friend, OSA SUE ALLEN and ADA D. ALLEN, infants, by and through HAL EDWARD ALLEN, their father and next friend, TOBY HICKS, CARL HICKS, GREGORY HICKS, et al., Appellants and Cross-Appellees,

VS.

BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY and J. W. WILSON, JR., Treasurer of Prince Edward County; STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA and WOODROW W. WILKERSON, Superintendent of Public Instruction of the Commonwealth of Virginia, et al., Appellees and Cross-Appellants.

Cross-appeals from the United States District Court for the Eastern District of Virginia.

DECREE—Filed and Entered August 12, 1963

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgments of the said District Court appealed from, in this cause, be, and the same are hereby, vacated; that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Richmond,

for proceedings consistent with the opinion of the Court filed herein; and that each side bear its own costs on appeal.

Clement F. Haynsworth, Jr., United States Circuit Judge:
Herbert L. Boreman, United States Circuit Judge.

I dissent:

J. Spencer Bell, United States Circuit Judge.

[fol. 277] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

[Title omitted]

MOTION TO STAY COURT'S DECREE PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI—Filed August 21, 1963

Motion is herein made to stay the decree entered by this Court on August 12, 1963, vacating the judgment and remanding the above cause to the District Court, with instructions to abstain from conducting further proceedings until the Supreme Court of Appeals of Virginia has decided the case now pending on its docket entitled County School Board of Prince Edward County, Virginia, et al., v. Leslie Francis Griffin, Sr., et al., and that decision has become final.

Appellants believe the aforesaid decree is based upon in-
[fol. 278] valid legal premises and are preparing to file a petition for writ of certiorari in the Supreme Court of the United States as expeditiously as they can, after they have been furnished with a certified copy of the record herein by the Clerk of the Court.

It is respectfully submitted that the Court's opinion raises an important federal question which should be disposed of by the Supreme Court of the United States. Appellants move, therefore, that the decree be stayed pending

the filing and disposition of the petition for writ of certiorari by the United States Supreme Court.

Robert L. Carter, 20 West 40th Street, New York 18, New York;

S. W. Tucker, Henry L. Marsh, III, 214 East Clay Street, Richmond 19, Virginia, Attorneys for Appellants and Cross-Appellees, by Robert L. Carter.

Dated: August 20, 1963.

Certificate of service (omitted in printing).

[fol. 279] August 23, 1963, opposition of appellees and cross-appellants to motion to stay court's decree pending filing and disposition of petition for writ of certiorari filed.

September 4, 1963, statement of appellants and cross-appellees as to reasons for requested stay filed.

[fol. 280] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

[Title omitted]

ORDER DENYING MOTION TO STAY JUDGMENT, ETC.
—September 16, 1963

Upon consideration of the plaintiffs' motion for a stay of the judgment of this Court, and it appearing that a stay is unnecessary to further proceedings in the Supreme Court of the United States, and that the plaintiffs will suffer no irreparable harm if the stay is not granted;

It Is Now Ordered that the plaintiffs' motion to stay the judgment in this Court, pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court of the United States, be, and the motion hereby is, denied.

Clement F. Haynsworth, Jr., United States Circuit Judge;

Herbert L. Boreman, United States Circuit Judge.

[fol. 281] DISSENT TO ORDER

I dissent because the effect of this order will be to further entrench and perpetuate the irreparable harm inherent in the operation of an illegal tuition grant system while the public schools of Prince Edward County remain closed.

J. Spencer Bell, United States Circuit Judge.

[fol. 282] Clerk's Certificate to *foregoing* transcript (omitted in printing).

[fol. 283]

SUPREME COURT OF THE UNITED STATES

No. 592, October Term, 1963

COCHEYSE J. GRIFFIN, etc., et al., Petitioners,

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al.

ORDER ALLOWING CERTIORARI—January 6, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is set for argument on March 30, 1964.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.